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IN THE CASE OF THE
Swedish Convoy,
PRONOUNCED IN THE
HIGH COURT OF ADMIRALTY OF ENGLAND,
ON THE ELEVENTH OF JUNE, 1799;
TOGETHER
WITH A PREVIOUS HISTORICAL SKETCH OF THE
EUROPEAN, AND IN PARTICULAR THE ENGLISH
SYSTEM OF CAPTURE.

Translated from the Danish,
AS WRITTEN
BY PROFESSOR SCHLEGEL, *K*
DOCTOR AND PROFESSOR OF LAWS AT THE UNIVERSITY
OF COPENHAGEN; ASSESSOR IN THE SUPREME
COURT; MEMBER OF VARIOUS LEARNED
SOCIETIES, &c. &c.

LONDON:
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OF THE

SEVENTH

IN THE CASE OF THE

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PRODUCED IN THE

HIGH COURT OF ADMIRALTY OF ENGLAND

ON THE EIGHTH OF JUNE, 1891

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REMARKS
ON THE
JUDGMENT IN THE CASE
OF THE
SWEDISH CONVOY,
&c. &c.

EVERY war between two or more of the powers of Europe, is attended with more or less inconvenience to the other states in that part of the globe which do not immediately take a part in the war. This is more particularly the case with a maritime than continental war: the reason of which is, that different principles are adopted in one from those in the other, or rather, because to the present moment, no generally approved maritime laws have been adopted in Europe, much less guaranteed, on account of the too preponderating naval power of Great Britain; whilst, on the contrary, the continental powers have agreed as to certain common regulations, which are, in some degree, secured by the equi-

poise or balance of power existing between the great States of Austria, Russia, Prussia, and France. It has long since been declared unjustifiable in land war to exercise hostilities against the unarmed, although the subjects of an enemy, by plundering their property, or molesting them in their agricultural pursuits; whilst, on the contrary, it is considered as completely lawful to capture the enemy's merchant ships, take possession of their cargoes, and thereby probably cause the total ruin of individual, industrious citizens. In a continental war, all neutral property, ascertained to be such, is deemed sacred and inviolable; but, in a maritime war, the belligerent thinks himself fully justified under one pretence or other (such as the possibility that the vessel or cargo may be enemy's property, or that there may be contraband articles on board), in causing or permitting his ships of war and privateers to capture neutral merchantmen, and bring them into port, when the legality of the seizure is examined into and decided upon by a Court of Admiralty, established by the belligerent, which, at times, observes no other rule than what convenience or policy may dictate.

As soon as piracy assumed a more legal appearance, and the hostilities of subjects, under

pretence of reprisals, were privileged by the sovereign, with commissions, or letters of marque, (*lettres de marque et de reprisailles*), the commercial states were anxious, by laws and ordinances, to prevent the serious loss which threatened the neutral trade. The Italian free states, as well as some of the places in Arragon and Catalonia, which were nearly in the exclusive possession of the maritime trade of the South of Europe, as well as the Hanseatic towns in the North, successively in the 12th and 13th centuries admitted and swore to observe the celebrated sea laws, called *Consolato del Mare*, in which it was determined with respect to capture, that a neutral cargo should be sacred, even though found on board an enemy's ship; but that enemy's goods in neutral ships should be considered as liable to condemnation, on paying the stipulated freight to the neutral owner.*

In consonance with this principle, nearly all the subsequent treaties in the 14th and 15th centuries were formed; but as these determina-

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* *Il Consolato del Mare*, cap. 23. The edition of these laws in Italian and Dutch, in 4to, by Abraham Westerveen, Advocate, in Amsterdam, 1704, has been esteemed the best, with various critical remarks, explaining the old Italian translation, in conformity with the original, which is in the old Catalan or Limosin language.

tions gave rise to a thousand difficulties in ascertaining the nature of the property, more particularly when the ancient custom of the merchant attending his merchandize was abolished, and the cargo frequently belonged to various proprietors; such as carried on commerce by sea began to wish for a more certain criterion, the better to be secured against the aggression of captors; which was, that the nationality of the owner of the cargo should no longer be taken into consideration, but solely that of the ship; so that a neutral vessel should not be liable to seizure, although having enemy's property on board, and much less if merely destined to an enemy's port, with the single exception of what were called warlike contraband articles: on the other side, neutral goods found in the vessel of an enemy were subject to confiscation. It was principally the Dutch who brought about this change in the maritime law of nations, as, from being at that time the factors of all Europe, they were more particularly interested that this system should be adopted, and agreeably to this principle, which is in general called free ship, free goods, *le pavillon neutre couvre les marchandises*, most of the commercial treaties from the middle of the last century to the present period have been concluded.

Neutral commerce was not, however, by these means fully protected; the belligerent powers allowed themselves, notwithstanding, on the commencement of hostilities, to give instructions, whereby the ancient regulation that enemy's property became lawful prize, even in neutral ships, was again made binding upon those powers with whom there had not been any particular treaty concluded, specifying any thing to the contrary, and that with additional severity, insomuch that the neutral ship owner not only lost his freight, but his vessel. Louis the XIVth, and, from his example, Spain issued sea ordinances, even in times of peace, whereby that abolished rule was again called forth, but with the omission of the before-observed modifications. Even with those powers with whom treaties had been concluded, many irregularities were exercised to which the exception of warlike stores extended at pleasure, gave abundant opportunities. At times the positive meaning of the treaty was set aside, on the plea of sea ordinances and instructions to captors differing from it, as if an *ex parte* comment could do away the validity of the treaty.

No power, in the mean time, made greater inroads in the privileges of neutral commerce, than the English, from the time of King Charles

the Ild, relying confidentially upon their increasing power at sea : the trade of the northern nations was in particular an object of their jealousy, because they furnished their natural enemy, France, with the necessary materials for ship-building : probably, likewise, agreeably to the opinion of many writers*, inasmuch as it interrupted the course of that ambition, which appears to have aspired to an exclusive trade. In the year 1689, the pretensions of England went so far, as to prohibit all foreign states from trading with France, and she compelled the United Netherlands to make a similar declaration ; but when Denmark and Sweden concluded a treaty to maintain the freedom of their commerce by reprisals, it was deemed more politic to adopt milder measures. In the Spanish war of succession, England gave indeed no real cause for complaint ; the trade with France continued, as far as concerned the English, even in the midst of hostilities ; but the complaints were frequent, when England took part in the Austrian succession war. The injuries which in

* Such as Mr. Steck-in his *Essais sur divers Sujets relatifs à la Navigation et au Commerce, pendant la guerre, à Berlin, 1794*, p. 112. Busch *uber die durch den jezigen Krieg veranlasste Zerruttung des Seehandels*, Hamb. 1793, s. 78, 82, 131, 133. Von Martens *Verfuch uber Caper, feindliche Nennungen und insonderheit Wiedernehmungen*, Gott. 1795, s. 36.

particular were committed against the Prussian traders, gave, as is known, rise to King Frederick the II'd's laying an attachment on the Silesian debt due from him to England, in consequence of the obligation he took upon himself to liquidate it, when Austria ceded that province to him. When England loudly protested against this measure, he caused public justifications to be published, in which the rights of the neutral flag were for the first time fully explained ; and he even referred to the maxims of the British ministry, who, after full inquiry, had themselves acknowledged these rights at the commencement of hostilities, but which nevertheless were but in little estimation in their tribunals. On the other hand, England published the opinions of four different lawyers, which went to justify the sentences complained of, and which were founded principally on the grounds of the law prescribed by the *Consolato del Mare*. It caused even great surprise at that time, that the British government and the lawyers of the country were above a century behind hand in the maritime law of nations, instead of advancing with the times : but what shall we say, when even in the recent English sentences, those antiquated reigning principles are quoted, and *that* after the many important steps which since that period have

been made to establish the general acknowledgment and freedom of the neutral flag.

France was seduced by this conduct of Great-Britain, in like manner to disturb the neutral, and more particularly the northern commerce, by way of reprisal. In the seven years war there were so many Danish ships captured by the belligerents, that the government found it necessary, by a separate deputation to the respective Courts, to complain of these continually increasing injuries.

The late Counsellor of State, Hubner, who was employed upon these missions, took this opportunity, in a publication of his own*, so clearly to demonstrate the legality of the demands of the neutral flag, that the writers on the law of nations since that period have almost unanimously allowed the justice of his opinion, that "free ship makes free goods." France again acknowledged this principle in her treaty with the self-created North American States; and as she in consequence was embroiled in a new war with England, the French government published instructions to its ships of war, which although in

* *De la saisie des batimens neutres, à la Haye, 1759, 2 vols. 8vo.*

effect more mild than the preceding, were still not consistent with the natural and usual rights established by the law of nations.

The English government, on the contrary, issued instructions, in which they authorised their ships of war to detain all neutral vessels laden with the property of the enemy, or contraband goods, among which were reckoned naval stores, and that without in the smallest degree, excepting those states which by treaty were particularly exempted from having their vessels detained under this pretence. The natural consequence of this was, that the sea swarmed with English privateers, who, without distinction, captured the ships both of neutrals and the enemy. A considerable Dutch fleet, laden with timber and other naval stores, destined to France, was captured and condemned, in direct contradiction to the express tenor of the treaty concluded with Holland, and notwithstanding that these ships were proved to have sailed before the declaration of hostilities. This act of injustice was the reason that Holland also took a part in the war against England, and of her close alliance with France, and may be esteemed one of the first causes of the internal disturbances which afterwards distracted that once flourishing country. In the mean time, the British go-

vernment, continuing, under various pretences, to capture Danish, Swedish, and Russian ships, these three northern powers resolved to put a stop to depredations which threatened the ruin of their trade ; and, with combined forces, to defend the privileges of their flag ; for which purpose they agreed annually to equip respectable squadrons during the continuance of the American war. Prussia and Naples subsequently joined this armed neutrality. The principles maintained were—1st. That a neutral ship made a free cargo, even if it was enemy's property, unless there were more warlike stores on board than was immediately necessary for the ship's use during the voyage.—2dly. No stores were to be considered military, if not clearly intended for warlike purposes.—3dly. Nothing could be taken to the port of a belligerent, when it was so closely blockaded by the enemy's ships of war or batteries, as that a merchant ship evidently could not enter without danger of being taken.—These resolutions were communicated in due form to the powers at war, namely, Great Britain, France, Spain, and Holland, with a declaration that it was determined to maintain them with an armed force. The powers at war (Great Britain excepted, who replied in a doubtful tone), uniformly approved of and acquiesced in these propositions. In the mean time, the latter power

was compelled quietly to submit to these terms, and modified its instructions accordingly. The British Court of Admiralty became more cautious, and did not slightly pass conditional sentences, excepting against ships belonging to such states as had no armed force to protect their rights. Other maritime powers, such as Austria, Portugal, Venice, Tuscany, Genoa, and the Ecclesiastical States, acknowledged the same liberal principles as the Northern powers, by ordinances or treaties.

From this statement it is proved, that the maxim of free ship, free goods, was already acknowledged in the middle of the 16th century, and even by England, (which shall hereafter be more particularly proved), notwithstanding this power, more than any other, has violated it, and that consequently it was not a new pretension during the American war, as English lawyers pretend it to be : on the contrary, it is certain, that instead of its being as before decided in particular treaties, it was now at once acknowledged and specifically sanctioned by all the maritime powers and states, Great Britain excepted, as not only conventional, but agreeable to the established law of nations and fundamental right. A hope was thus universally entertained that

maritime commerce would, in succeeding wars, meet the same protection as land trade, and that the ravages of war would in future not extend themselves to the peaceable and industrious inhabitants of neutral states. The uncertainty of this expectation was, however, shortly proved. In the war that ensued between Gustavus the III^d. of Sweden, and Russia, he suffered himself so far to be misled, as to violate the very system in the northern commerce, that he had heretofore so laudably and valiantly maintained. He renewed the antiquated claim of Sweden, that money should be considered as contraband, and directed his cruizers to seize all ships destined to the enemy with specie, although, indeed, this resolution was not prosecuted with vigour. The illusion, however, vanished completely during the present war, as it is but too clearly demonstrated how little the voice of national rights is listened to by earthly potentates, who, in general, suffer might to overcome right. Under pretence that this has been a war carried on against rebels and insurgents, subverting all social order, and deserving the severest chastisement, Great Britain adopted once again the same system of starvation which William III. had attempted against France above a century ago, and which Queen Elizabeth, a century before

that, had carried into execution against Spain*, and required that the Danish, as well as other neutral governments, should prohibit their subjects from supplying the French with corn. Every one knows with what unanswerable arguments our late universally regretted minister Bernstoff repelled this unjust requisition. But as the Danish government well knew that the most sacred rights are but ill respected, unless strengthened with an effective force, it entered into a treaty with Sweden for the express purpose of setting bounds to the destructive depredations of captors. It must, nevertheless, be allowed, that the method adopted by Great Britain, of carrying this system into execution, considerably alleviated the hardship practised upon neutrals, as these latter received a reasonable indemnification for such of their corn cargoes as were intercepted.

At length the British Ministry saw that this system not only militated against the common rules of equity and justice, but equally so of sound policy, as it solely tended to irritate all classes of French citizens, without producing the expected

* In 1589 Queen Elizabeth caused sixty Hanseatic ships, laden with corn and naval stores, destined to Lisbon, then in the hands of the Spaniards, to be seized, exclusive of other neutral vessels, declaring her intention to be that of subduing Spain by hunger.

end, physically impossible of enabling them to dictate terms of peace, and it was in consequence abandoned.

Now, however, the neutral trade began to be disturbed by the French : on the first breaking out of the war against England, it appeared as if France meant to adopt strict principles of justice with respect to maritime trade. The Convention had, with general approbation, decreed, that all their privateering should be abolished, and this decree was carrying into execution, when an enquiry was made of the British government if it was willing to enter into an engagement not to issue any letters of marque during the war. This proposition, however, not being acceded to, a few privateers in the commencement were permitted, which seldom molested neutrals. The want of corn and other necessities, indeed at one time caused the existing government to lay an embargo on all neutral vessels laden with these articles, for which an indemnification was promised, but to this day remains unpaid. In other respects, the want of neutral commodities caused the rights of neutrals to be respected, notwithstanding the system of terror which reigned in every department.

When the Directory succeeded, at the fall of Robespierre, privateers were universally encou-

raged, as being concluded the surest means of weakening the power of Great Britain. In an equal degree the rights of neutrals began to be infringed. It became insufferable, when Bonaparte's victorious arms shut all the Italian ports against the English trade ; and France, strengthened by its alliance with Spain, and its possession of the Venetian navy, was, for a time, complete mistress of the Mediterranean. The Executive Power and Courts of Justice, which should have set bounds to these irregularities, on the contrary supported them by their decrees and sentences : the Judges and Representatives of the Nation were publicly accused as having shares in privateers, and that this circumstance dictated the lenity shewn them.

The Legislature, by its decrees relative to privateers, seemed to make no distinction between friend or foe ; and in retaliation for the British projected system of starvation, precluded neutrals from trading in any English produce or manufactures ; and this decree was executed with such extreme rigour and severity, that a yard of real or supposed English cloth was sufficient to cause the condemnation of both ship and cargo. And in order to carry this act of injustice to its highest pitch, a retrogressive power was given to the decree, by enforcing it against

such vessels as were at sea when the law was passed. In all polished nations it has been customary when a ship and cargo have been confiscated, to restore at least the private adventure and effects of the master and crew ; but in France, condemnation even extended to deprive these of their property.* The British government saw clearly that self-interest dictated a necessary respect to the claims of neutral commerce, in proportion as they were disregarded by the French, yet this period was but of short duration. Scarcely had Nelson's brilliant victory at Aboukir obtained for the English a decided superiority on the ocean, before neutrals experienced a sensible encroachment on their privileges : on the contrary, privateering, at the reiterated instances of the Directory to the Legislature, was diminished, experience at length teaching them that by those means they had deterred all neutrals from approaching their coasts, by whose means alone (their own merchantmen being annihilated), they were enabled to carry on any foreign commerce. It deserves, in the mean time, to be recorded, that at this period the Danes and Swedes were in France accused of partiality to the English, while in England the same accusa-

* This more particularly appears in the many pamphlets that have issued from the Parisian press in this respect, and which in part have been translated into our Danish daily papers.

tion was laid to their charge of entertaining too strong prejudices in favour of the French. The comparison of these impeachments is in my eyes the best apology for the strict neutrality of the Northern Powers ; for as they permitted trade to flow in its usual channel, the merchants speculated at different junctures occasionally with either party.

In the mean time as the complaints of merchants both in Denmark and Sweden against the increasing injuries committed by French and English cruisers accumulated, without the remonstrances of the respective Ministers being attended to, or remedying the evil, they requested of their governments, with the view of more effectually protecting trade, that a convoy of ships of war should attend and escort their merchantmen ; as otherwise, although citizens of a state at peace, they must, from necessity, be obliged to abandon all foreign commerce whatsoever. The respective governments conceived they could not with justice withhold to their merchants that protection of their trade, which they owed equally to all classes of citizens ; the less, as agriculture and the progress of internal industry, and consequently the welfare of the whole state, depend so much upon its foreign commerce. A convoy of ships of war was held to be

the more certain means of obtaining this end, as the belligerents had hitherto constantly respected neutral vessels sailing under the protection of their respective governments, considering the very circumstance of the convoy as the best possible guarantee for the ships and cargoes being in every respect navigated agreeably to treaty. But this well-founded expectation was equally fallacious. The public papers soon announced that England had successively detained two distinct Swedish fleets, although each had been convoyed by a ship of war, and as various reports were circulated justifying this violent measure, which had caused general consternation in the mercantile world, I became the more impatient and curious to know the true nature of these captures; by accident the sentence of the British High Court of Admiralty came early into my possession. Sir William Scott's name, as the author of this sentence, promised much, as I well knew that he was highly esteemed in England for his talents and marked ability in jurisprudence or knowledge of the law, and by these means had obtained and filled the most honourable stations. The sentence itself displays much learning, and seems to be composed with a good intention of discovering what is strictly right: but I nevertheless hold the fundamental arguments on which the theory is erected to be com-

pletely fallacious. I have thought it required and deserved a more strict examination, as from its learning, and in appearance strict impartiality, it might easily deceive those who have less knowledge of the laws of nations, to do homage to the arguments on which it is founded, and so, by the opinion of the multitude, sanction injustice *. To us, as Danes, this examination becomes the more interesting, as the learned Judge expresses his satisfaction in having had an opportunity to search in these times into the right that is set up, that the convoy of a neutral ship of war exempts the merchantmen under her care from visitation ; at the same time signifying an intention of making this pretended right of search valid against the convoy of all neutral states, without any respect to their flag whatsoever. Indeed, some less attempts have been made to visit and detain some of our convoyed merchant ships, but they have been resisted in a way that becomes every brave Danish seaman, and will continue to be resisted as long as the memory of Juel and Tordenskiold shall exist among us. In examining the principles or basis of the sentence of the Court of Admiralty, I in other respects only obey the summons of Sir William Scott

* A translation of this sentence is annexed, the better to enable every one to form his own opinion on this subject.

himself, who decidedly invites not only the investigation of his own countrymen ; but, as in a case of universal importance, that of every foreign power. If in this examination I should, notwithstanding every exertion, fail, I shall with gratitude accept the elucidation of others ; my impartiality will be the less suspected, as the sentence does not immediately concern my countrymen. But even if it did directly affect the interest of Danish shipping, I should not undertake this defence if my opinion were not well supported, as in my present situation nothing but a strict adherence to truth and justice could induce me to enter upon the subject. I know myself the less prejudiced against England, as it is a nation I particularly respect ; and if it does not hold the principal station, yet it is not behind hand with any, in being universally enlightened, cultivated, and industrious.

Sir William Scott observes very truly, in the commencement of his sentence, that it should not be pronounced with any reference to the uncertain rule of politics ; but agreeably to the general and unalterable interpretation of the law of nations ; and in the same manner as if the cause were to be decided by an upright Judge at Stockholm. Nothing can be said against this ; but what I mean to contend is, that the sentence

is not consonant to this universally allowed principle, but built upon uncertain rules. If the Judge adds to this, "that the nature of the present war gives to Great Britain the rights of war relatively to neutral states, in as large a measure as they have been regularly and legally exercised at any period of modern and civilized times," I can, on no account, approve of such limitations. The particular nature of the war may certainly create a difference as to the mutual conduct of the Powers at enmity; but in no wise can it be acted upon with respect to neutrals: if any of the Powers at war transgress the old prescribed customs, the opponent is, doubtless, justified in using reprisals. If one of them seeks to encourage insurrection in the country of his enemy, the other may legally pursue the same means against the aggressor. But this should not have the smallest influence on a neutral state, because neutrality requires that as it acts towards the belligerent powers in the same way as before the war commenced, it can, on the same ground, demand from the belligerent a similar treatment as in profound peace. In case even one of the Powers at war should forget the sacred duties due to neutrals, yet that is by no means a reason why the other Power likewise, on its part, should commit the same injury; the right of reprisals cannot be carried to so great an ex-

tent as to be exercised at the expence of a third neutral state, otherwise the lot of neutral subjects would be far more pitiable than even those of an enemy, as the latter are only liable to injury by one Power, whereas the former, as the case absolutely stands in the present war, are ill-treated by both parties.

This circumstance, however, Sir William has doubtless, before his eyes, that the present war is occasioned by a revolution, accompanied by the most horrible atrocities; and which, agreeably to the plan adopted by those in power in France, was intended to extend itself all over Europe. I reply—the greater states in Europe are probably called upon to check, by arms, this destructive system, as far as it can be prevented by open force; to the less powerful, sound policy may dictate a conduct of wise neutrality; as to those whose strength does not allow them to carry on hostilities, unless by a much greater exertion than the rest; and this is precisely Denmark and Sweden's situation. Whether a state shall remain neutral or not, its own government is best able to decide. With as little reason as one Power can require another to depart from its neutrality, can it also impose new burthens upon it, under pretence that it does not feel the weight of the war; and the less, in the present case, as the

war has been commenced without any consultation with the neutral state, and is carried on, and will be concluded without any advantage to the latter being taken into consideration.

The learned Judge calls Baron Puffendorff's authority to his aid in justification of his sentiments. The latter, in a letter to the well known civilian, Groningius, (who, in the war of 1692, which was carried on by England, Holland, and other states, against Louis XIV. had taken upon himself to defend the rights of neutral trade), allows that the Northern Princes did not listen much to the complaints of their merchants, notwithstanding they were neutral, as the war was carried on against a tremendous Power that threatened to enslave all Europe, and to destroy the Protestant religion. I must here previously remark, that Puffendorff was not a native Swede (though great stress is laid on that circumstance in the sentence), but a German; he was, indeed, in the Swedish service when he compiled his work on natural rights, and the law of nations; but when he wrote this letter, he was in the territories of Brandenburg; it is dated Berlin, and his then Master took an active part in the war against France. In the reply, it will be seen, that it is built not upon *juridical* but on *political* grounds; it commences by observing, that the

subjects of Northern Powers make complaints, but that the governments do not seem willing to support them. Hence it may easily be perceived, that this citation is altogether inapplicable in the present case, which should be decided upon legal grounds ; and where the subjects are not only neutral, but their government joins in the complaint, and so far from refusing to afford them attention, that it has, in a marked manner, taken them into its peculiar protection. By a perusal of the work itself, it may be observed, that Puffendorff pointedly allows neutral Powers the right of protecting their commerce by convoy, when they do not carry on a contraband trade, and that it is against the open abuse of neutrality alone that he inveighs*.

Although the present war certainly embraces greater objects than wars in general, yet Great Britain has much less right to make such a demand, as her zeal in commencing it was certainly

* D'autre côté néanmoins si les Rois du Nord peuvent maintenir leur commerce avec la France, en faisant escorter les vaisseaux marchands par des navires de guerre, pourvu qu'il n'y ait point de marchandises de contrabande, personne n'y trouvera à redire : la loi de l'humanité et de l'équité entre les nations ne s'entendant pas jusqu'à exiger que sans aucune nécessité un peuple se prive de son profit en faveur d'un autre. Mais comme l'avidité des marchands est si grande, que pour le moindre gain ils ne se font aucun scrupule d'aller au delà des justes bornes, &c.

not in defence of public justice, or from any peculiar care for the continental constitutional balance of power, (notwithstanding these grounds have since often been dwelt upon, in order to put the English as well as other nations in motion ;) but arose from a mere political consideration, namely, that in the incorporation of the Austrian Netherlands with France; and the opening of the Scheldt, England would have to encounter a dangerous rival. I do not conceive that England will pretend to justify her conduct to neutrals, by alledging that France has not used them better: the unjustifiable proceedings of the latter can only be considered as the effect of the convulsions of a revolution, and can therefore not be looked upon as sanctioned by a well regulated state. It would indeed be too glaring a contradiction, if Britons, who in considering the French, as they say, as trampling the rights of other nations under foot, and therefore to be esteemed in a certain degree only as outlaws, should adopt the principles of this nation so far as to copy their outrages against peaceable states; besides, whoever is acquainted with the great resources of France, its riches, and produce of every description, must know that it is not the most fortunate maritime war, or the entire ruin of its external trade, which can effect a counter-revolution; but that if ever it is to be accom-

plished, it must be by a continental war in some shape like the present.

The grounds which have been assumed, from the circumstances of the present war, to justify an attack on the rights of neutral trade, are certainly not now taken by England for the first time. When William III. in 1689, wished to prevent neutrals from trading with France, he declared in the same manner, that the war was of that nature as to justify extraordinary measures ; although it was in truth carried on without any necessity. The same demands were made at the commencement of the American war ; but the tone was soon lowered. Indeed, in general, the English government has, in every war, endeavoured to make its cause that of all Europe ; and the Courts of Admiralty have supported these pretensions by not infrequently adopting political principles, instead of the natural doctrines of the law of nations ; and indeed in a way so peculiar to itself, as to force a smile even from the most indifferent spectator. " England is lost," it was said, in a sentence pronounced in the Court of Admiralty in 1778, in consequence of a Danish ship being captured wherein some salt beef was found, which it was insisted upon was destined to the enemy, merely because it was salted—" England is lost, if neu-

trals are thus permitted to continue supporting the enemies of our country ”*

True policy seems on the contrary to dictate to England a strict observance of the rights of neutrals, in order to prevent the latter from uniting themselves with its enemies, as was the case last war with Holland. But a more weighty, and in the present contest prevailing argument, is this, that it is the neutral who keeps an equal trade open between both parties, which otherwise would be completely blocked up. It stands uncontradicted, that England would experience an irreparable loss, if its various productions of art and nature did not find a sale in France, Spain, and Holland, or their colonies, whose markets furnish so rapid a consumption of these articles. The British government is so convinced of this truth, that it secretly encourages this trade, so strictly in a direct way prohibited by the French. How then can the same government, in the same breath, with any appearance of justice require, that the Northern States should forego their trade with its enemy in their principal commodities or produce, such as corn from Denmark, and iron and timber from Sweden. I much doubt whether England, under similar circumstances, would

* Busch über die durch den jetzigen Krieg veranlasste Zerrüttung des See handels. Hamb. 1793. s. 94.

permit the Northern Powers to prohibit her from disposing of her produce to the enemy, notwithstanding that the sentence in question at present seems willing to allow them this right. The British government has at least, until the present period, in the few sea wars wherein it has not been personally concerned, known how to establish and support the rights of its own flag.

If the Judge of the Admiralty, in his above-mentioned argument relative to the nature of the present war, adds his opinion, "that the British government is authorised by the nature of the present war to exercise all the rights which at any period of modern and civilized times have legally been exercised by States at war," it may be maintained, that if a stress is laid on the words "legally exercised," an inference may be fairly drawn that the arguments for these belligerent rights must not be taken from what *has been*, but what solely and alone *ought to have been done*. But the addition, "at any period of modern and civilized times," requires some consideration, if this really has been the meaning of the Judge, or if he rather did not wish to defend the present illegality by similar instances which occurred in foreign wars of the most enlightened nations, (and of which history, and more particularly the English, contains many

examples); and this conjecture appears the more to be confirmed by the subsequent parts of the sentence, wherein Sir William seems to fall into the same error with which Rousseau upbraids Grotius: *sa plus constante maniere de raisonner est d'etablir toujours le droit par le fait* *; a manner of acting which might tend to prove, that injustice grew in a geometrical proportion among the potentates of the earth; because if one committed an injustice, it would serve as an authority for a thousand subsequent grievances.

The next previous observation the Judge has thought it necessary to make in the present war on behalf of his countrymen, is, that the seizure of the Swedish ships took place in the British Channel, not far from the coast. It is well known that Great Britain formerly pretended to exercise a right over the whole of the so called British Channel (*Mare Britannicum*), which indeed she wished to extend as far as Cape Finisterre on the one side, and the promontory Stat, in Norway, on the other. Selden's work, *De Mari Clauso*, was compiled with a view of justifying these pretensions, which first originated about the time of Cromwell. It is likewise well known how powerfully Grotius, the

* Du Contrat Social, liv. i. chap. 2

advocate of Holland, refuted him in his treatise *De Mari Libero*. Holland was nevertheless obliged to allow this dominion. Other powers have, however, never acknowledged the right of England's jurisdiction over a greater proportion of this sea, than what naturally belongs to every Power, namely, over a space that can be defended from the land, or, as far as a cannon shot reaches ; but where the sea serves as a boundary to one or more states, then the centre of the stream is the line of demarkation, unless particular treaties or a tacit acknowledgment should extend the limits further. Such pretensions are, however, now even by Englishmen themselves (and among many I will only mention one unexceptionable authority, the celebrated historian Hume*), allowed to be preposterous. The place marked as of the capture, appears likewise to shew that Sir William has not been desirous to give his country a greater right over the sea than what from this principle or axiom can be due ; for it is expressly stated, that the occurrence took place "close upon the British coast." The subsequent narrative of the fact leaves notwithstanding upon the mind some suspicions that it really did happen at a certain distance from it, although from the want of positive data we cannot come at the exact truth. We will therefore take it for

* Hist. of Great Britain, vol. i. p. 213.

granted, that the ships were actually taken possession of upon that portion of the sea which is within the British dominion. The capture, if in other respect illegal, will not be less so; for having occurred within those limits, rather than at open sea, as the liberty of trade allowed to all civilized nations is in an equal degree transgressed, and the treaty of commerce with Sweden as highly infringed. With what justice and energy would not Great Britain complain, if the Danish government was to cause an English convoy to be seized in the Sound, merely because it exercised an universally acknowledged right over those Straits?

After these previous remarks the Judge of the Admiralty lays down the facts consonant to the evidence before him. He states, that the nature of the case itself could alone be known from the depositions of the captors, as the claimants had not given any information on the subject. This silence he conceives to be a full admission of the truth of the captors evidence. On this head it will be permitted me to observe, that the conclusion would, in a private case, be strictly correct, or as relating to Swedish subjects alone, who are obliged, in other cases of capture, in conformity to the custom of other European powers, to acknowledge the jurisdiction of the British Court of Ad-

miralty, even if they did entertain some doubts as to its impartiality. This case is, however, from its national importance, widely different; it concerns the detention of a Swedish ship of war, and all the ships that went under her convoy; so that the Swedish government is immediately interested in the event;—in a case of this nature, the Court of Sweden is not bound to submit its complaints to the judgment of a British Magistrate; and consequently may well consider it as departing from its dignity to communicate the desired intelligence to the Court of Admiralty; nor can this Court of Justice, under such circumstances, with any shew of reason insist, as in the cases of private parties, that silence is an admission of the facts asserted. In the sentence the facts are briefly stated as follows: That Captain Lawford, commanding a small British squadron, meeting a Swedish fleet of merchantmen under convoy of a frigate, sent an officer on board the frigate to enquire about the cargoes and destination of the merchantmen, and was answered, that they were bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar; whereupon Captain Lawford thought it necessary to procure orders from the British Admiralty how he was to conduct himself on this occasion: the orders were in effect, to detain these merchant ships, and

to carry them into the nearest English port, and they were communicated to the Swedish commander, who shewed his instructions to defend his convoy to the last. The Swedish frigate, as well as the British squadron, in consequence, got clear for action. In the night, possession was taken of most of the Swedish vessels. In the morning, the Swedish frigate hoisted out an armed boat, and took by force a British officer out of one of the Swedish merchantmen, and carried him on board the frigate, at the same time sending an officer to Captain Lawford, to complain that he had taken advantage of the night to get possession of his convoy ; but that after further and frequent representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, without exchanging a single shot. It is well known from the public papers, that for this conduct, by the sentence of a Court Martial, he was condemned to death.

Sir William hence proceeds to examine the juridical side of the question. He is of opinion that the detained ships and cargoes are confiscable on two grounds, which are, however, not distinctly separated in the sentence, namely, one *formal*, because they in a forcible manner resisted search ; the other *material*, as the car-

goes consisted of contraband stores, chiefly destined to the ports of the enemy. We will now try each of these grounds, and the arguments by which the Judge supported them :

1st. " The right of visitation, he says, is the incontestible right of all lawfully commissioned cruisers of a belligerent nation against all merchant ships, (afterwards it is said ships in general), without exception. If this right be well founded; it must of course convey an obligation on the part of the neutral to permit this visitation, otherwise that right could not exist.—2dly, The rights of a belligerent cruiser cannot be done away by the Sovereign of the neutral country interposing his authority, or permitting his merchantmen to be convoyed by ships of war.—3dly, That the penalty for the violent contravention of this right, is agreeably to the conventional law of nations, confiscation of the property intended to be withheld from search."

Answer to the first position. It has already in the introduction been shewn, that privateering at sea militates against the general and natural principle of the rights of nations, that war is carried on betwixt government and government, and not against individual unarmed citizens ; and that this axiom is acknowledged in land wars among

the Powers of Europe, though, by a singular contradiction not unfrequently experienced in the actions of mankind, it does not take place in the operations of a maritime war. The great Frederick of Prussia, that philosopher on a throne, felt this absurdity, and in consequence proposed to the North American States, as an article in the treaty concluding between them, that in case of any future war, they should not, on either side, issue letters of marque or reprisals. Yet, whatever honour this resolution did to the great Frederick, who proposed, and the American government, which accepted it, the example will be of small authority, inasmuch as it is most probable these governments will never proceed to any hostilities against each other. It is likewise worthy of remark, that the Imperial Catherine would not license any privateers in her first war against the Turks; that in the latter she only allowed them, under certain limitations: that in the war with Sweden she gave them no encouragement, and was particularly cautious of disturbing neutral commerce, notwithstanding the many irregularities practised by the Swedes. Nay, though the present Emperor, Paul, has taken such an active part in the war against France, yet we do not hear of any Russian privateers being fitted out. These, in my opinion, are extremely enlightened principles, and the examples

such as will perhaps convince Sir William Scott, that one ought not, as he has done in one part of his sentence, to discard, with a sneer, those who reprobate the privateering system, as disgraceful to the maritime law of nations, or seek to render their endeavours ridiculous, by terming them modern philosophy and philanthropy, because they tend to establish what hitherto has not been seen, "a military war, and commercial peace." The former wars of Russia, above alluded to, will, I think, prove that such a system is not incompatible with military operations. In the midst of the most bloody continental wars, traffic is carried on without interruption, and the markets or great fairs are held and mutually respected by the hostile Generals, who not only protect the persons of the merchants who frequent them, but their merchandize also, in coming and going from the said fairs, from every molestation : why then should this be impossible in a maritime war ? The philosophy is so far from being modern, that it is, on the contrary, of very ancient date. Not one of the more ancient nations, not even the enlightened Greeks or Romans, were acquainted with a legal system of depredation ; and all who seized on peaceable merchant ships, were considered as sea-robbers (*pirata*), and as enemies to humanity.

To a dark and ignorant age we are indebted for a regular system of privateering ; a circumstance which will certainly not entitle it to our most favourable opinion ; to which may be added, as an historical truth, that Governments, by legalizing such acts, were labouring to repress those piratical hostilities which private individuals on their own account were accustomed to exercise against the commercial world. Even subsequent to that period, privateering was looked upon as little better than piracy, a sentiment in which one shall be apt to coincide, when it is considered how many outrages are committed, notwithstanding the severe punishments that have been instituted for such acts of depredation, with what facility they plunder and personally ill-use the mariners, in whose ships, notwithstanding the most subtle scrutiny, they have not been able to discover any thing illegal. This alone should induce enlightened Governments to endeavour to abolish the existence of privateers, as being a seminary for smugglers and outlaws. I will not mention the immorality they occasion in neutral countries, by inducing, and possibly almost obliging merchants to make use of dishonest means, in order to avoid the persecution of such corsairs, since the belligerent Powers are probably but little anxious on that head ; the inconveniencies, however, that ensue

from such a system to their own subjects, can certainly not be regarded with indifference.

The chief difficulty in abolishing privateers, consists in the advantage the belligerent Powers expect to derive from them. This profit might, however, be richly counterbalanced by the losses their own trade would avoid, and the numerous concomitant evils that attend them. The French nation has doubtless been a considerable gainer this war by this kind of warfare ; its government has, however, latterly found it necessary to restrict it within certain bounds ; their own foreign trade is ruined. The greater the number of privateers that are fitted out, the more difficult it becomes to furnish their navy with the necessary complement of seamen, as this latter service is less advantageous. If the war is of any duration, neutrals become much greater sufferers by captures than the contending Powers. England, during the present hostilities, finds but few occasions for capturing French vessels, as the trade of the latter (except *cabotage*, which cannot be interrupted), is carried on through the medium of neutrals, and the French cruizers are likewise seldom enabled, from the circumstance of the British government having compelled their own traders to sail under convoy, to capture an English vessel. From this representation it is evident,

that if the neutral Powers united to repel the depredations committed on their subjects, this system must eventually subside. The armed neutrality during the last American war, partly carried this into effect. Had Russia and America in the present war adopted the same plan as Denmark and Sweden, experience would have proved its efficacy. An abhorrence for the French revolutionary principles, no doubt, prevented these Powers from forming a combination of this nature, and disposed the Americans to conclude a disadvantageous treaty with England; but should a war of an ordinary nature hereafter arise, the universal sentiment respecting the rights of trade will doubtless be maintained by the neutral Powers, and the crisis then approach, which the Judge seems so much to dread—that privateering will cease. Nevertheless this alleviation in maritime wars will be more owing to a wise policy, than any just regard for suffering humanity*. I have hitherto endeavoured to prove, that a general system of capture, although separately put in practice by each of the contending Powers, cannot be justified either by necessity or sound po-

* *Memoires de Jean de Witt*, 3d ed. Ratisb. 1709, p. 163. *Mably droit public de l'Europe avec les remarques de Rousset à Amsterdam et à Leipzig*, 1761, t. 2, chap. xii. p. 322, 332. *Essais sur divers sujets relatifs à la Navigation et au Commerce pendant la guerre par Mr. de Steck*, à Berlin, 1794, p. 58, 61.

licy. But if even I were for a moment to consider it as lawful against an enemy, it does not necessarily follow, that either of the belligerent Powers is authorized, under one pretence or other, to seize, detain, and condemn the ship of a neutral, who takes no share in the war whatsoever. Neutrality requires, that the Power which observes it, may, in every respect, demand the same liberty after as before a war : that its merchants may, unmolested, send their ships as circumstances may require, either to the one or other State, either on freight, or on their own account, with the produce of their own, or any other nation, and with goods destined either for warlike or ordinary uses. In opposition to this it is contended, first, that the privileges of war are unlimited ; secondly, (in order to establish that enemy's goods in neutral ships can legally be seized), that enemy's property may be taken wherever it can be found ; thirdly, with reference to contraband goods, that a neutral who transports such articles, thereby commits a breach of neutrality.

With respect to the *first* position, it does not prove what it ought to prove ; as the rights of war can primarily only exist against the enemy, and not against neutrals, with whom the war is to be considered as not in existence ; and, in the next place, the rights of war are infinite, and

boundless only with respect to the *quantity*, but in no shape to the *quality* with which it is carried on. Whoever conceives, that in the latter respect the privileges of war are uncircumscribed, need only be reminded, that even barbarians deem it the highest breach of good faith to employ assassins, or poisonous weapons, against an enemy, or to violate a capitulation, when once concluded, although such breach might be of the highest consequence in furthering the objects of the war, and that it is among all polished nations considered as dastardly in the extreme to kill, plunder, or ill use those who are unarmed.

The *second* position : that one is authorized to take possession of the property of an enemy wheresoever it may be found, is too general, and for that very reason false, as, in the first instance, it should be limited to property, which being public, or belonging to the State, is alone to be considered as hostile, and in no ways ought to be extended to the effects of private individuals. Under this distinction in land wars it is warrantable to make requisitions, or raise contributions in a conquered territory, which are regularly proportioned and levied, but a general plunder is on no account justifiable ; and in the next place, this privilege cannot even be universally adopted, save and alone in such places

where the acting Power legally can exercise hostilities, as on the territory of the enemy, or on the open sea, consequently not on a neutral territory, or in such places where an armed force cannot be used against the enemy, without violating the most sacred rights and privileges. It might appear at the first blush, that the territorial rights of neutrality cannot be infringed, where possession is taken of enemy's property in a neutral ship on the high seas, this notwithstanding decidedly is the case; for though it is admitted that no Power can pretend to any dominion on the open sea, it nevertheless may certainly claim such a distinction over its own vessels sailing on such seas: This pretension is acknowledged by a Government, when it orders its ships to carry the national flag; in giving laws and instructions for the conduct of the commander when at sea, &c. and the mariners consider such orders as well founded, by hoisting those colours, and obeying orders. An opposite opinion would tend to establish the absurdity, that mariners, in quitting port, resumed an independent state of nature, and again, in entering a harbour, alone became amenable to the laws; according to this maxim there would be in as many ships as sailed upon the ocean, so many independent Powers, which might declare war or make peace with one another at will: all

subordination must cease, when their allegiance to their country no longer united them ; the greatest crimes committed at sea could not legally be examined or punished ; and various other striking incongruities would be the inevitable consequence of denying to a State jurisdiction and controul over its ships at sea. From this deduction it is clearly established, that the principle of “ free ship, free goods,” is by no means conditional, but altogether established by the *jus gentium*, or law of nations.

This principle is not less authorized by treaty, which I trust I shall be permitted cursorily to prove, as the English writers, and the Judge of the Admiralty Court equally deny the truth of this assertion. The celebrated *Busch*, in Hamburgh, has given a list of thirty-five commercial treaties which have been concluded from 1642 up to the year 1780, or the period when the armed neutrality took place ;* and on the contrary, in the same space of time, there have been only two treaties concluded, namely, betwixt Great Britain and Denmark in 1661, and that with Sweden in 1670, wherein the old principles expressly are admitted, that it shall be seen to whom the goods appertain, exclusive of other old treaties, which, in this respect, bear a dou-

* Vide his Publications, s. 47, 52.

ble interpretation. The armed neutrality caused this rule to be acknowledged by all maritime Powers, England excepted. From 1780 up to the present time, at least twenty-three treaties could be cited, in which this regulation has been admitted, as may be seen by the list annexed to the end of this publication; and on the other hand, I only know of one treaty between Great Britain and America, which disallows this maxim. Hence one may safely draw this inference, that those treaties which allow of the neutrality of a flag, contain the general rule, as they consist of the plurality, and that the few, which adopt a different idea, may be classed as exceptions; from whence it follows, that the former, and not the latter, are applicable to those States with whom no separate treaties have been concluded, in so much the more, as they are founded on the natural law of nations. The pretence of English writers, that the few treaties which alone relate to the property of the cargo, and not that of the ship, shall, in such unsettled cases be followed, is contrary to every sound interpretation, as it is making an exception into a rule. It is worthy of remark, in order to consider the pretence of England in its true light, that she herself, in the middle of the fourteenth century, (consequently at a time when the *Consolato del Mare* was the current funda-

mental law), concluded treaties, in which the rights of the neutral flag for the first time were formally acknowledged, namely, the treaty of Edward III. with the Spanish trading towns in 1351, and that of the same King with the cities of Lisbon and Oporto. In the seventeenth century it is again, England which first concludes a treaty conformably to this principle, to wit, with Portugal, in 1642, which was renewed in 1654—the only one of the kind which, from political reasons, has been respected by England; and this treaty is that which stands at the head of the long list of treaties in which the neutrality of the flag is allowed*. Subsequent to that period, England has, partly from compulsion, partly from free will, concluded several treaties upon this principle, as with France in 1655, 1677, 1713, 1742, and the latest so remarkable on account of its circumstantial explanation relative to the neutrality of the flag on the 26th of September, 1786: moreover, with the United Netherlands in 1668 and 1674; and also commercial treaties with the Ottoman Porte and the States of Barbary. Notwithstanding all this, it is pre-

* Queen Elizabeth had, in the year 1576, a considerable time preceding the above period, maintained the neutrality of the flag, when the Dutch seized some English vessels, which had Antwerp (consequently Spanish and inimical) goods on board, and procured to herself full indemnification for this affront, by detaining four Dutch privateers. (Busch, s. 145.)

tended, on the part of England, that this principle has only been partially brought on the tapis by the Northern maritime Powers, in order to extend the advantages of their trade. In their perplexity they still refer to the *Consolato del Mare*, as the invariable basis of maritime jurisprudence, as if on one side ordinances could weaken treaties; or else they rely upon a *Grotius*, and the testimonies of some old writers on the law of nations, whose systems are more ancient than the year 1642, an epoch so advantageous to the neutral flag; and, amongst the more modern, on a *Vattel*, who, upon this subject, is so wavering and contradictory, that he by no means deserves that praise to which his work would otherwise have justly entitled him. If the authority of the learned, and not solid principles or treaties were to decide the cause, we might cite the names of a Hubner, a V. Steck, a Hennings, a Busch, a V. Martens, who all in distinct voluminous treatises on this subject, unanimously (although citizens of different States), agree in defending the privileges of neutral commerce. It deserves in fine to be remarked, that England adopts the principles of the *Consolato del Mare* so far only as concerns her interest, and not her duty. They confiscate neutral goods found on board the ships of the enemy, and they do not always give to the neu-

tral master, if part of the cargo belongs to the subjects of the enemy, his freight, agreeable to charter-party, which are violations of the law to which they refer. How then is it possible to trace any fixed principle among so many irregularities.

I now come to notice the *third* and last argument, which is used as a justification for the rights of the belligerents in restricting neutral commerce, namely, that they may at least prevent the enemy from being supplied with the necessities of war, or, as they are called, contraband stores. Although this limitation is fully grounded on the present conventional law of nations, yet it is not sanctioned by the natural law. *Vattel* indeed pretends, that there is a breach of neutrality in supplying the enemy with such articles, although he himself allows it not to be transgressed in a continental war by a land trade of this description, not even allowed by subsidy treaties. It does not, however, in the mean time appear, that a Power, permitting such a traffic, thereby evinces a partiality inconsistent with its neutrality, without indeed it encourages its subjects to carry warlike stores to the one belligerent, and prohibits the exportation thereof to the other. It is likewise evident that the prohibition of exporting such articles in time of war,

if limited to what is reckoned as indispensably necessary and requisite for such purposes, may be combined with a great loss to the neutral State, if its chief trade consists in time of peace in articles of this description, as gunpowder, saltpetre, brimstone, musquets, cannon, &c. in which case this State would be highly interested in defending the privileges of its trade, even in this respect : still more does the case apply if the contraband articles of war are carried to the extent specified by England. The only limitation, which the natural law seems to prescribe to neutral commerce, is, that the conveyance of provisions, money, or warlike stores, &c. should not take place to any port blockaded by an hostile fleet, as by these means the blockade would be rendered useless ; yet, in former times, this prohibition was exercised with such lenity, that ships were only admonished not to frequent such ports, or their cargoes were purchased by the besiegers, a proceeding which justice requires to be observed, when the merchant is ignorant of the blockade. How, in other respects, contraband articles are considered in the positive law of nations, I shall have a better opportunity of examining when I come to that part of my present treatise wherein the question is discussed, if the goods actually detained on board the Swedish

ships in dispute are so to be considered or not.* Yet, though I contend that privateering against an enemy, and much more against the neutral, militates against the natural law of nations, I willingly acknowledge that it is grounded on the positive law of nations, both the customary and the conventional. But the foundation of the legality of privateers is a circumstance of great moment in the settlement of all disputes which may exist between a belligerent and neutral Power concerning it, and more particularly when the question of right arises as to the visitation of neutral ships. Since, as it is decided that the right of search, and, under certain circumstances, capturing and condemning vessels sailing under neutral colours is alone conventional, it naturally follows that it cannot *ad libitum* be exercised by the belligerent, and that the interpretation in every doubtful case should take place in favour of the neutral State, and not against it, agreeably to the established rule of justice : *Non plus intelligitur datum quam concessum.*

* The proposition contained in this Treatise as to the illegality of the system of capture, according to the natural law of nations, deserves to be compared with the "Essai sur la Liberté de la Navigation et du Commerce des Nations neutre pendant la guerre, par Totze, 1780, sect. v. p. 31, &c." translated into German, entitled, "Die Freyheit der Schiffahrt, &c." Leipzig, 1780, 5ter Abschn. s. 27. 56. Essais sur divers Sujets relatifs à la Navigation, &c. par Mr. de Steck, chap. xviii. p. 117, 127.

The neutral Powers, even those who more particularly dwell on the right of free ship, free goods, agree, that the cruizers and privateers of the belligerent may first search if a ship be really neutral, as the frequent custom of a vessel carrying foreign colours, renders this but an uncertain token; and, secondly, if really laden with contraband goods. But, in allowing a belligerent this right, and imposing upon their trading subjects the duty of suffering this search, certain bounds have been established which cannot be trespassed, without infringing on the rights of neutrality. It has by treaty only been allowed towards such ships as sail singly, or at their own risk, but never with respect to ships of war, or merchantmen going under their convoy. The manner in which a merchant ship is to be searched, is likewise clearly ascertained by treaty. The armed vessel is to keep at the distance of a cannon shot, to send a boat on board the merchant ship, in which there are to be only the Captain, or another officer, and his clerk, or at the utmost a third person, exclusive of the crew requisite to manage the boat: the ship's papers should alone be examined, and, if found correct, the search is not to extend to the cargo, nor in any case can the searchers be permitted to break open locks, or exercise any violence, under pain of incurring the severest punishment.

We shall now proceed to examine the second proposition of Sir William Scott, and upon which he dwells in order to come to the result, that the detained Swedish convoy is liable to confiscation; it is, that the right of search cannot be taken from the belligerent cruizers, neither can the neutral Sovereign interpose his authority in causing his merchant ships to be convoyed by an armed force.

I conceive I have, in the preceding essay, fully established, that the whole *caper system*, and the rights annexed to it of searching merchant ships, are conventional alone, and therefore not liable to be extended at will. But it is evident, that this privilege is capable of being very differently interpreted, when it is admitted, that the cruizers of a belligerent Power are authorized to visit even neutral merchantmen under convoy. Every treaty, that speaks of such a visitation, pre-supposes that they are unconvoyed ships which are to be searched: nor is there a single treaty, amongst the great number of commercial treaties, amongst which many may be found not at all favourable to neutral trade, which authorises a visitation of those ships that are under convoy. An article of this sort would be altogether absurd, the Power which should accede to it, would accede to its own shame, and confess, that in granting its subjects a special

protection, it was granting a mere shadow or illusion, since even such vessels must be given up to the greedy rapacity of cruisers, just the same as if they had neither desired nor obtained this security ; the Government that should allow this, must admit that it placed greater confidence in the examination of a foreign Power, if their subjects departed from their duty, than in its own, or (which would not be less dishonourable) that its public actions deserved no confidence, where any paltry benefit was to be derived from the forfeiture of its neutrality. Sir William lays much stress upon the circumstance, that the belligerent Power has no certain proof, or sufficient guarantee, that neutrals are not carrying on an illicit trade, without searching them ; and that this guarantee cannot be taken away by their being under convoy. This objection is answered already, by the aforementioned general observation, that the right of visitation cannot be extended at pleasure ; I will, however, add another remark, which appears to me unanswerable : The right of search, agreeably to all treaties, does not extend further than to an investigation of the ship's papers, to examine the cargo when the former are found to be correct, is strictly forbidden. But I will now ask what security has the belligerent Power that the ship's documents are correct ? No other than what

might be rejected in such cases, namely, the public authority, in whose name the papers are issued. In the ships that are convoyed, this security is still greater, as either the Government which grants the convoy, or the Commander in Chief of such convoy, by a previous and strict examination, is assured of the regularity of each case, in consequence of which, merchants who wish to carry on an illicit trade, are obliged to let their ships go at all risks, without expecting such peculiar protection. It is consequently an evident contradiction to be obliged to take, in the visitation of merchant ships, the declaration of the neutral Government for a sufficient guarantee; and on the contrary, to call it in doubt when it is more particularly made by the appointing of convoys to such ships. As long as different States remain at peace with each other, the respective Governments should place reliance in their mutual solemn declarations; to doubt their truth, is an insult to right, a step towards hostility. The accusation of advancing falsehood, and supporting imposition, is an affront between one individual and another; and ought an imputation be legally thrown on a peaceable and regular Government? Not any neutral Power has as yet acquiesced in such treatment. The Judge, indeed, seems to intimate, as if he should acknowledge such a proceeding against England as legal,

if the occurrence should arise that Sweden were to be engaged in a war, in which Great Britain continued neutral. I, for my part, much doubt whether the British Government would quietly witness Swedish cruizers visiting their ships, when under convoy; and every one that knows any thing of the nice feelings of British honour will coincide in my opinion. In the few wars wherein Great Britain has remained neutral, its Government has constantly resorted to the same principles which in its own wars it rejects; it has with the same warmth claimed the privileges of neutral trade which it now transgresses. But that which irreversibly proves, that the customary principle, acknowledged by the law of nations, of neutral merchant ships, under convoy, not being subject to visitation, is, that no belligerent power has, as yet, ever ventured, in its instructions to its cruizers, (and these most frequently depart, not only from the natural principles, but equally the conventional stipulations, of the law of nations) to establish the axiom, that ships convoyed, as well as those that are not under convoy, are equally to be searched, and brought into port. Even the British Government has not taken such steps in the present war, although its instructions to its ships of war are more extensive than heretofore. That English cruizers do not hold themselves justified in visiting such vessels,

the present case clearly proves, from the circumstances detailed in the sentence. It says, that Captain Lawford would not take upon himself to visit and detain the Swedish convoy, on finding the decided opposition of the Swedish commanding officer; his instructions consequently did not authorize such a violent procedure, and he sent to the British Admiralty for orders, before he carried the visitation into effect. That the Admiralty permitted this search, does not prove any thing, as it has only the effect of taking all personal responsibility from the Commanding Officer, which he otherwise must have incurred; but it by no means legalizes the transaction against the neutral State, if it be in other respects illegal, as is admitted by the Court of Admiralty. Sir William has, in this instance, not been able to appeal to any domestic or foreign law, which authorized a visitation of this description, any more than he could cite a single authority among the many writers upon this matter in the law of nations. He has as little been able, by any solid reasoning, to justify this right; in want of more weighty argument, he has therefore had recourse to shallow declamation. On the contrary, I can not only prove, as is already done, by unanswerable arguments, that such a right can by no means be exercised by any belligerent maritime Power, but I can equally shew, that it militates

against the conventional law of nations, not merely from the silence in this respect of treaties and instructions to cruizers, but by producing positive treaties, laws, declarations, and well-established authorities to the contrary. But before I appeal to these, it is necessary I should remark that such proofs are only adverted to as of supererogation ; for it does not rest with me to disprove the right, but with the Judge who pronounced the sentence, which affirms it, to support the same, *affirmanti non neganti incumbit probatio*), a duty from which he is in the present case the less exempt, as the right he contends for is altogether novel, and the thesis he denies, that an armed convoy releases the merchant ships under its protection from visitation, has constantly hitherto been regarded as an axiom in the usual law of nations.

The only maritime law, as far as I know, which contains a positive declaration on this head, is of our King, Christian V. viz. in his Laws, 4th book, 7th chap. 2d art. which directs “ that if several of the ships of his Majesty’s subjects sail together, through fear of cruizers, or other unfortunate events, if any armed ship should be amongst them, her commander is to hoist the colours, to defend the rest, and on no account to suffer any foreign vessels to board

him under any pretence whatsoever, either to look at his pass, or sea documents ; but to keep them off to the utmost of his power : to which effect all the other ships sailing in the same fleet are to assist him to the extent of their abilities. And should any foreign vessel, by force, attempt to board him, he shall then oppose such violence to the utmost, and by no means permit any act to take place derogatory to his Majesty's dignity, or the detriment of his subjects. And if any one disobey this injunction, and do not exert himself on the defensive, if it shall be in his power, he is to be punished agreeably to the articles of war.* Or if blame shall be imputable to any of the seamen, for refusing on such occasions to do their duty, they shall equally be punished according to the articles of war."†

Our legislature has therefore already, in the last century, established it as a duty, not to permit search when merchantmen formed a fleet,

* The sea articles here alluded to, are doubtless those of 27 March, 1683 ; the 112th, 115th, and 124th, declaring the punishment of loss of honour, life, and property, or simply life to officers.

† The articles of war, in the 12th §. specify, that whoever does not combat as is his duty, shall suffer corporal punishment, or death ; and the 110th §. declares, that death is the punishment of those who do not act on the defensive, or shall leave their post. The articles of war, of 8th Jan. 1752, now in practice, are in some respects more lenient.

amongst which there might be an armed vessel authorized to carry the King's colours, least by a submission to visitation, the honour of the flag should be infringed. From this determination the sentiments of the legislator may easily be perceived, with respect to ships sailing under the convoy of a ship of war. Whether such refusal of search, made by any fleet is founded on the law of nations, may be considered as doubtful, because the security which it, under these circumstances, offers to cruizers, that the ships and cargoes are conformable to law, is precarious, it being in itself private, and given by the parties themselves; whilst on the contrary, when vessels are escorted by a King's ship, duly authorized by official instructions, it becomes a public security issued by the government itself; and the law having sanctioned that problematic right, it has, in consequence, the more confirmed this one, which is certain and decided. This part of the law further tends to prove, that the claim of a ship of war exempting merchantmen from visitation is by no means novel; but on the reverse, extremely ancient; and that it formerly was extended further than at the present period.*

* In other respects, we need only compare the meaning of this law with the ship's articles of 22d Sept. 1658, which relate to those who navigate vessels sailing to the West Indies, Guinea, the Mediterranean, and upon long voyages to the West; and which art. 16 and 18 allow the legality of resisting search, and authorize defensive measures on these occasions.

The most recent treaties I know of, which relate to this subject, are the commercial treaty between Denmark and Russia, dated Petersburg, $\frac{3}{19}$ Oct. 1782, the 18th article of which particularly determines, that if either of these Powers are engaged in a war, the ships of the neutral trader shall submit to a legal visitation; but if they are convoyed by one or more ships of war, the simple declaration of the commanding officer, that such vessels contain no contraband articles, shall be deemed fully sufficient, and no visitation is to take place.*

This is equally settled in the commercial treaty between the United Netherlands and the North American States, dated Haag, the 8th

* Refer to this treaty, in Marten's Recueil des Traités, t. ii. p. 292. "Supposé tout fois que de tels vaisseaux marchands se trouvaient escortés par un ou plusieurs vaisseaux de guerre, la simple declaration de l'officier commandant l'escorte, que ce navires ne portent point de contrabande, doit être envisagée comme pleinement suffisante, et aucune visite n'aura plus lieu." The 19th art. says, "Il n'aura pas si tôt apparu par les titres produits, ou par l'assurance verbale de l'officier commandant l'escorte, que les navires marchands ne sont point charges de contrabande, qu'il leur sera libre de continuer sans aucun empêchement ultérieur leur route; et ceux des vaisseaux de guerre ou armateurs de part et d'autre, qui se seront permis ce nonobstant de molester, ou d'endommager d'une façon quelconque les navires en question, seront obliges d'en répondre en leurs personnes et leurs biens, outre la réparation due a l'insulte faite au pavillon."

Oct. 1782, art. 10.* Likewise in the treaty between Sweden and America, dated Paris, the 3d April, 1783, art. 12.† A similar explanation is made in the treaty between Austria and Russia, $\frac{1}{11}$ Nov. 1785, art. 13 in the Empress's, and art. 15 in the Emperor's declaration.‡ The same appears by the treaty of commerce between France and Russia, dated Petersburg, 31st Dec. 1786—11th Jan. 1787, art. 31; a treaty so much the more remarkable, as two years after the termination of the American war, these two great Powers renewed and confirmed the principles adopted during the war, of protecting neutral commerce, and which are here termed *axiomer*.§ The treaty between Russia and Naples, of $\frac{6}{17}$ Jan. 1787, art. 20, affirms the same, with the addition in the 21st article (which may also be found

* Marten's Recueil, ib. p. 254. "Dog zal geen visitatie van papieren geveert worden van schepen onder convoy den orlogschepen, maar geloof worden gegeven aan het word van den officier, het convoy leidende.

† Ib. p. 334. "Nevertheless the exhibition of the papers shall not be demanded of merchant ships under the convoy of vessels of war; but credit shall be given to the word of the officer commanding the convoy.

‡ Marten's, ibid. p. 625, 638.

§ Marten's, t. iii. p. 17 and 18. "Mais en cas que ces navires marchands fussent escortés par un ou plusieurs vaisseaux de guerre, la simple déclaration de l'officier commandant de l'escorte, que les dits navires n'ont à bord aucune contrebande de guerre, devra suffire pour qu'aucune visite n'ait lieu.

in the treaty concluded with France), that the cruizers, having received the verbal declaration of the commander, shall on no account prevent or molest the merchant ships in their voyages; and that they further shall be liable in their persons and goods for the damage they may occasion, exclusive of the satisfaction to be made for having insulted the flag. * The same declaration is to be found in the treaty between Russia and Portugal, dated $\frac{2}{10}$ Dec. 1787, art. 25 and 26. †

That this explanation of escorted merchantmen not being liable to search, is to be found in the later, and not the former treaties, has, doubtless, no other reason than that this clause was formerly deemed perfectly unnecessary, as no foreign Power dared to appropriate to itself such a right, until the increasing pretensions of Great Britain have in our days compelled the other naval Powers, by an article in their treaties, to preserve neutral ships of war from being liable to insult.

* Marten's, *ib.* p. 45. " Si de tels vaisseaux marchands se trouvoient escortés par un ou plusieurs vaisseaux de guerre, la simple declaration de l'officier commandant l'escorte, que ces navires ne portent point de contrebande doit être envisagée comme pleinement suffisante et aucune n'aura plus lieu.

† Marten's, *ib.* p. 118, 119.

This custom has further been established by the fact which occurred in the year 1762, when the Dutch Captain Dedel, with an armed force, resisted a visitation intended to be put in execution by an English frigate, with respect to the merchant ships under his escort. The States General in every respect approved of the said Captain's conduct, and referred to a proclamation of 20th Sept. *anno precedente*, upon this subject, in order to prove the legality of the case, and that it was, moreover, authorized by the general custom of all civilized nations.*

It is, however, not the neutral Powers alone who have pleaded such a custom, the belligerent Powers have equally acknowledged it. The visitation of ships under convoy is not only prohibited by treaty, but it is sometimes positively, and always tacitly forbidden, in the instructions and regulations issued to cruizers and privateers. In a proclamation, dated 26th Jan. 1781, which the United States caused to be issued when they took part in the American war, it is particularly ordained, in the 6th article, "that when merchant ships sail under convoy, faith shall be duly given to the declaration of the commanding of-

* This proclamation is to be found in the *Recueil van Zeezaken*, t. ix. p. 207.

ficer, and visitation not required when the latter gives an assurance, that, to his knowledge, the ships composing his convoy are not laden with contraband stores.*

The Empress Catherine II. not only by treaties in times of peace, took special care of the rights of neutral commerce, and more particularly as to protection of convoys; but subsequently, when she was engaged in a war with the Turks, and afterwards with the Swedes, she inviolably maintained the sacred rights of the code of the law of nations which she had so seriously inculcated in the American war, without allowing herself any deviations, when her enemy Gustavus III. seemed to forget those principles.

In the instructions given to cruizers, issued at Petersburg, the 31st of December, 1787, art. 13, it is particularly ordered, that where neutral merchantmen are escorted by a ship of war of the nation to which they belong, they are not to address themselves to the merchantmen, but to the commander of the convoy, and, on his declaring that they have no contraband articles on board,

* Vide the Extract of this Proclamation, published by order of the Royal Danish Board of Commerce, in Hopfner's Collection of Public Acts, for the year 1781; and a German translation thereof in Henning's Collection of State Papers during the maritime Wars of 1776-1783: 2d b. §. 292.

such declarations shall be sufficient, without any visitation being required*. It is necessary to observe here, that these orders apply generally, and that there is no distinction between those neutral States with whom treaties have been concluded, which prohibit visitation under these circumstances ; and others, or, as the English like to express themselves, betwixt privileged and unprivileged nations. British cruizers have never in former, and very seldom in latter times, taken upon themselves to insist upon such a right of search. In the American war only one instance in the seas navigated by Europeans is known to me, which concerns us Danes, and this excited an universal sensation. Several English privateers sailing in company, demanded to search some Danish merchant ships convoyed by a frigate, under Captain Schionning's command, and, on meeting with a refusal, they used coercive measures, to which this officer submitted, and was, in consequence, in a disgraceful manner broke by a general Court-martial held for the purpose of enquiring into

* Marten's Recueil, t. iv. p. 512. " Lorsque des vaisseaux neutres seront escortés par un vaisseau de guerre de leur nation, on ne pourra aucunement toucher aux premiers, mais on devra s'adresser directement au commandant du convoi, et si celui-ci déclare que les dits navires sous son escorte n'ont à bord aucune marchandise de contrebande de guerre, on se contentera de sa déclaration, sans exiger que la visite ait lieu.

his conduct. In the West Indies, cruizers have at times given way to similar illegalities towards Danish ships, but they have always met with a proper repulse, and one cannot, in the irregularities of such cruizers, find any proof that the British Government really approved of them. In the present war, Danish convoys have constantly been respected by the belligerent Powers*. Only one instance occurs, wherein certain British ships of war took upon themselves to visit some scattered vessels of a considerable Danish fleet sailing under convoy of a frigate in the Mediterranean, but it was acknowledged to be an error, and Lord St. Vincent gave every satisfaction to the Danish officer who complained—a mode of acting, which, as far as my judgment extends, does not a little add to the high reputation this gallant Admiral has gained by his splendid victories. The French have even restored such ships, as, from the casualties of a storm, have been separated from their convoy, and, on such occasions, were captured by cruizers, on the commander's assurance that they were under his escort. The present, as far as I can find, is the first instance wherein such conduct has been authorized by the British Government, and where

* Note of the Translator. This was written previous to the late detention of the Danish convoy in the Downs.

a tribunal, by a formal judgment, has been willing to legalize it; and that it is so, is the more confirmed by there being no precedent quoted in the sentence itself, an authority to which English Judges never neglect to refer, although preceding sentences could not reasonably be esteemed by foreign States as binding upon them.

The novelty of this demand is doubtless the reason, why the writers on the law of nations, who have expatiated on the rights of neutral trade in time of war, as *Hubner*, *Galliani*, *Lampredi*, and *V. Steck*, have not discussed this question, but have limited themselves to examine how far the right of search extends itself when cruizers meet unconvoyed merchant ships. The before-mentioned letter of Puffendorff to Groningius, shews, in the mean time*, that he considered Potentates as entitled to let the ships of their subjects go under convoy, when not laden with military contraband articles, from which a conclusion may be formed, that he equally conceived that the convoying ship of war might reasonably resist all visitation, as otherwise it would be useless to go under convoy. The only writer of all those I am acquainted with, who has, though but summarily discussed this question, is V. Mar-

* Vide page 24.

tens; and he denies, in the strongest manner, the right of belligerent cruizers to visit such ships as sail under convoy. This positive authority, although single, has the more weight, as this man has acquired great celebrity from his extensive knowledge in the conventional law of nations; and his impartiality can the less be doubted on the side of England, as he is a public professor at his Britannic Majesty's University at Gottingen.

Having thus established that the right of search cannot be extended to neutral ships under convoy, I shall proceed to examine the *third* principle upon which Sir William founds his sentence, namely, that the penalty for the violent contravention of this right is agreeably to the law of nations, confiscation of the property so withheld from visitation and search.

I shall *first* shew that this principle, in its full severity, is hardly correct, when ships, not under convoy, are spoken of: *secondly*, that it is completely false, when it (as is here the case) relates to ships which do sail under the protection of a ship of war: and, *lastly*, that if one for a moment is willing to allow the general truth of this principle, yet the circumstances in fact are such, that it can in no shape apply to the present case.

The arguments of which the Judge of the Admiralty makes use, in order to prove his pretensions, are, a passage in Vattel; a French sea ordinance of 1681, with Valin's Commentary on it; a Spanish ordinance of 1718; an English order of the Privy Council in 1664; and an English proclamation in 1672. Vattel says—“The transportation of military contraband stores cannot be prevented, if neutral ships, which are met at sea, are not visited; a right, therefore, exists to search them. Various powerful nations have, at sundry times, refused to submit to visitation in maritime wars; but, at the present time, a neutral ship, which resisted search, would from that reason alone, incur condemnation.”* I must remark, that Vattel, in this place, talks only of such ships as sail without convoy, and not of those that are convoyed, which the context clearly proves, notwithstanding that from the manner in which this part is cited in the sentence of the Admiralty, one might suppose the contrary. When he says, that *at the present time* a neutral ship which resisted search would, from that circumstance alone, be condemned, he has no reference as to how this applies to the natural law of nations, but only states how he believes it to be considered by the most modern and usual law of nations. Agreeably to the

* Le droit des Gens par Mr. de Vattel, liv. 3, chap. 7, § 114.

natural law, no right exists for detaining or visiting neutral ships, and consequently no obligation to comply with such a visitation. This right is founded merely on common practice and conventions. Hence, doubtless, it is, that the belligerent Power is reduced to use coercive measures with respect to every ship which resists the allowed visitation of its cruizers ; from whence it further follows, that the owner, captain, and crew, must put up with any damages which may ensue from resistance, and consequently all indemnification for the injury the ship, cargo, or crew may sustain, is out of the question. As none of the many commercial treaties have specified the punishment attached to resistance, the belligerent appears to me to be totally unauthorized to enact it : sea ordinances and cruising regulations cannot be brought forward as evidence to establish such a right, as they are simply *ex parte* ordinances, which cannot bind the citizens of another independent State : these are, however, the only authority the defenders of the opposite opinion have to refer to. Such a consent would be likewise unreasonable, as long as visitations are attended with so many abuses as prevail during the present period.

It is notorious, that cruizers scarcely ever govern their actions by treaties, which command

them to limit their examination to the ship's papers; they, on the contrary, adopt an inquisitorial kind of conduct, not unfrequently ill using the master and his crew personally, and breaking open chests and packages, notwithstanding this is strictly prohibited: the most trifling pretext is sufficient to occasion the detention of a vessel, and years may probably elapse before the cause is determined*. The Admiralty Court acts upon the supposition, that the ship and cargo are liable to confiscation: the claimant, contrary to every apprehension of right, is bound to shew the want of ground in the captor's pretensions, together with the legality of his ship and cargo: and the proof lies not in the mode prescribed by treaty, and the natural law of nations, but according to the self-created, and to him unknown rules of the belligerent Power†. If he succeeds in proving his case, after a long and expensive

* I have been assured that a cause has this year been decided in the British Court of Admiralty, which took its origin in the seven years war. Professor Busch mentions in his "*Nachtrag zu seiner Abhandlung über die Zerrüttung des Seehandels, Hamb. 1794,*" another case of capture, which commenced in the year 1781, and, at the time of writing his treatise, had not been brought to a conclusion.

† The English seem to be destitute of determined laws upon the subject of capture, the want of which induces the Judge to create optional rules, which are altered as circumstances dictate, and this the more frequently, as they are bound, in other respects, to follow

suit, his expences are rarely decreed to him, much less any indemnification for the considerable loss sustained in consequence of his detention, by the change in the market, or deterioration of his property. In case there be no pretence for capturing the vessel, those privileged sea marauders, whom we call privateers, exercise all sorts of tyranny ; compel the master to make them presents of money and goods, or take upon themselves this act of regular plunder, or carry away part of his crew, and thereby leave him, (in case of stormy weather), in imminent danger of losing his vessel *. Under such circumstances, one cannot absolutely blame the resistance one or more

the letter of the law, just as those who are accustomed to leading-strings are in general the least sure-footed. Notwithstanding foreign Powers have loudly and frequently complained that the English Courts of Justice neither keep to the meaning of the treaties, nor are guided by explicit laws, the British Government has as yet not taken any steps, through the medium of Acts of Parliament, to redress this defect. It has been said, that policy prevented this measure---an open, liberal policy, it can, however, on no account be termed. Vide Busch, l. c. s. 78, 84.

* Valin, although a great defender of the rights of capture, acknowledges, in his Commentaries on Louis the XIVth's Ordonnance de la Marine, liv. 3, tit. 9, art 13, (t. 2d, p. 271), where the punishment of death is inflicted on captors who take or cause to be taken any thing from a visited merchant ship, that "*cette punition à la vérité peut paroître rigoureuse en certains cas ; mais le penchant naturel des corsaires pour le pillage a fait penser qu'il étoit nécessaire de le réprimer dans ces occasions par la severité des peines.*"

merchant ships make to an armed vessel, which, under pretence of visitation, might exercise such acts of violence; to which may be added, that pirates of the States of Barbary, or other freebooters, are accustomed to hoist foreign colours when they demand visitation, and thus get possession of the merchant ship. Self protection demands, in such cases, a spirited opposition to the required search, nor can the punishing such resistance by confiscation be justified; but even if one would defend this as an act of necessity, yet, in order to diminish the hardship of visitation and privateering, it clearly appears to me that this ought alone to affect the guilty: that the ship is therefore alone liable to confiscation, the owner being answerable for the actions of his servant, or the captain's error, but on no account the cargo, without this, should be the property of the same owner, or belonged to an enemy, as it on no account can be attributed to the freighter, that the captain has resisted search, unless it be proved that such conduct was at his particular desire. In this respect, Hubner is evidently of my opinion*, and Vattel likewise says, that the ship, in such case, is liable to condemnation, without noticing the cargo. Sir William, in other respects, reproaches Vattel for mentioning

* De la saisie batimens neutres, tom. 2de, chap. iv. § 3, p. 99, 100.

this as a new custom, it being, according to his opinion, very ancient, having, like many other articles in the law of nations, its origin in the Roman law, and is likewise amongst the received principles of the generality of European civilized legislations, namely, that whosoever is contumacious, that is to say, does not submit to the regular legal proceedings, must be esteemed as guilty. It appears to me to be a most extraordinary and particularly forced application of that principle; from its nature it can alone be applied in municipal cases; and where the defendant is summoned, by a private or public plaintiff, to a tribunal before which he is bound to appear, but in no wise to the fact which has occasioned the process, and at the time when it is not discussed in the Court; much less can it be applicable in a dispute between persons who obey different Sovereigns independent of each other, and which arises on the open sea, where no territorial right exists. One must be driven to a great extremity indeed to have recourse to such arguments.

The Judge of the Admiralty further refers to Louis XIV's. sea ordinance of 1681, art. 12, which says, "That every vessel shall be good prize in case of resistance *and* combat;" but that, agreeably to Valin's Commentaries, the mere act of resistance alone is sufficient to condemn the

vessel. Valin, according to the Judge's explanation, elucidates this, by a citation from the Spanish sea ordinance of 1718, which is evidently copied from the French, but expressed in the disjunctive, "in case of resistance *or* combat." I must previously remark, that in Valin's Commentaries on the French sea ordinances, now before me, the Spanish is made mention of, but without that additional observation*.

When Sir William so strongly contends, that resistance alone is enough to carry with it the confiscation of the vessel, agreeably to the French ordinance, and without absolute combat being requisite; it is doubtless done in order, by the aid of sophistry, to lead to the point that the *mere threat* would, to this effect, be sufficient, without any active resistance; for this is in direct opposition to the words of the article, when it is thoroughly examined. "Every ship (says the article), which refuses to slacken sail after having been fired at, without shot, from one of our vessels of war, or from the armed ships of

* The reference of the citation is equally incorrect, as, according to that, this matter should be spoken of in p. 81; whereas it is mentioned in vol. ii. p. 269, 271. published à la Rochelle, 1771. Probably Sir William has had the same Author's *Traité des prises*, which I have not been able to obtain, although in the sentence the work cited appears to have been his *Commentaire sur l'Ordonnance de la Marine*.

our subjects, fitted out for war, may be compelled so to do, by means of our artillery, or otherwise, and in case of resistance and combat, shall be deemed good prize.* The words pointedly shew, that not the mere refusal of visitation, or menace to make resistance, is, in *casu legis*, but active resistance alone. Valin, in his Commentaries, expresses himself in a similar manner. "In case the captain of a vessel from obstinacy, rather than slacken sail, involves himself in combat, and the ship be taken, it shall be looked upon as good prize, exclusive of the corporal punishment the master shall be made to suffer, in case he is a Frenchman; more particularly if he has resisted a man of war, (not a privateer)." In case the master does not refuse to slacken sail, but only to shew his ship's papers, this punishment, pursuant to Valin's observation, art. 13, shall not take place, but the vessel is to be brought into the nearest French port, in order to be legally examined. One must not, from the words "*tout navire*," every ship, be led to believe that this applies to ships in general; the connexion clearly shews, that the interpretation of these words alludes solely to single ships sailing

* Tout vaisseau qui refusera d'amener ses voiles après la semonce, qui lui en aura été faite par nos vaisseaux, ou ceux de nos sujets armés en guerre, pourra y être contraint par artillerie ou autrement; en cas de résistance, il sera de bonne prise.

without convoy; the expression of every ship is chosen for the purpose of making known, that it is applicable as well to French as neutral vessels, which Valin himself acknowledges. This sea ordinance was, in other respects, put out of force, by the mild-thinking Louis XV. in cases of capture in the American war; and it excited universal disapprobation when France, during the present war, again added to it its former obligation. I am, therefore, much surprized that a British Judge of the Admiralty should cite this with so much satisfaction; and that surprize increases, when it is known, that this strict sea ordinance is built upon much milder principles than those upon which this sentence is founded; for here, mention is alone made of unconvoyed merchant ships, and of decided violent resistance, which required the exertion of coercive measures; on the contrary, the sentence extends it to vessels under convoy, and admits, that the mere refusal of visitation, or threat of resistance, carries the same effect with it. The article speaks solely of the confiscation of the vessel; the sentence extends it to the whole cargo,

The interpretation of the Spanish sea ordinance is the same as that of its source, the French; if this article in it, which is insisted upon in the sentence, be still in force, I cannot positively

decide; it is, however, certain, that Spain, in the present war, has shewn every possible respect to the rights of neutrals. Merchants have loudly complained of the conduct of the French and English cruizers; the Spanish have, however, been exempted from the charge.

The sentence finally refers to two English Orders of an ancient date, viz. those of 1664 and 1672, which were specially applicable to the wars of those times, without being intended to serve as precedents in future cases. This application is the more incongruous, as the Judge himself acknowledges that most of the determinations, contained in these orders, were, even at that period, generally disapproved, as of a novel and unusual severity; he is indeed of opinion, that from this reproach an exception may be made, as to the article to which he refers in the present case; but for this exception we have merely his individual opinion. He acknowledges himself, that in point of practice, it has not, for a length of time, been adopted. This shews, I conceive, plain enough, that the British Government has deemed it too severe. That this has arisen from any particular clemency, and not from any feeling of justice, few will believe who know how much, at all times, this government has favoured privateering, and how little neutral

complaints on this head have been attended to. That a tribunal, from its own authority, should allow temporary laws, which for more than a century past have not been esteemed valid, an effective power afresh, is evidently unreasonable, and is doubly so when this law becomes a law of punishment, which probably may carry with it the entire destruction of the property of those who fall under it.

The invoked article is in one respect more severe than in the French and Spanish sea-ordinance, as it here positively expresses, that both ship and cargo shall be esteemed good prize, whereas in the other it only speaks as to the ship; in other respects, the application is solely to merchant vessels, and it surmises, when the punishment is to be inflicted, that the ship does "fight, or make resistance."

If I, for a moment, were to admit, that every opposition on the part of a merchant vessel to permit a visitation from the cruizer of a belligerent, carried with it, agreeably to the law of nations, the forfeiture of the ship as well as the cargo, I am still fully able to prove, that such confiscation is not applicable to neutral merchantmen which sail under the protection of other vessels.

It has been already proved, that it is an allowed principle, as well in the natural, as in the now existing conventional law of nations, that merchant ships cannot be visited when under the convoy of a ship of war; but that cruizers who meet them must be satisfied with the declaration of the commander of the convoy, that the vessels are not engaged in any illicit commerce. Not any treaty, sea-law, or published instructions to privateers, authorize such a visitation: hence it follows, that the refusal of submission to search, from the commander of the convoy, as well as the ships under such convoy, cannot be esteemed a legal transgression; but on the contrary, the demand of visitation may be regarded as such. The neutral government, whose ship of war is used with such little ceremony or respect, would doubtless be justified in demanding satisfaction on such an occasion; this is confirmed by the mode of proceeding in the present case, as the British officer would not take upon himself the responsibility attached to visiting the convoy (as heretofore observed,) until he was fully authorized so to do by the British Admiralty. Whether he was empowered to use open violence, in regard to the Swedish ship of war, if instead of only threatening, that ship had actually employed force, may be called in question, as the orders of the Admiralty have not been produced in the cause.

I will even go farther; I will suppose that it was lawful to visit merchant vessels escorted by a ship of war; it is, nevertheless, certain, that the refusal of search, even on this supposition, would not carry with it the confiscation of the merchant ships, allowing that they might legally have been condemned, if they had resisted search without being under convoy. It is an acknowledged truth, that such acts as are committed by persons under orders, in consequence of instructions formally communicated to them, can on no account be directly imputed to them, if they are found to be illegal, as they are bound by virtue of their situation, being under orders, not to examine if the instructions or orders be *materi-
liter* (that is in and of themselves), legal or not; and disobedience on their part against such orders being even punishable, the compliance therefore cannot be treated as a crime. Soldiers or subaltern officers have never hitherto, in any well regulated state, been punished, because they, in consequence of superior military orders; or officers of justice, because they, pursuant to magisterial instructions, detained persons or goods that ought not to have been arrested. It is to the commanding officer, or to the magistracy alone which issued the orders, that one can address one's self. The convoyed masters of vessels are acknowledged to stand in such a strict compact of subordination with the chief of the con-

voy as long as the voyage continues, that the least disobedience on their part against his orders is seriously punishable. To punish them, therefore, for those acts they have committed in compliance with his positive orders, is equally as unjustifiable as to condemn soldiers for executing the commands of their officers. If, therefore, any error has been committed in a refusal to submit to search, such error cannot be imputed to the masters of the vessels, but solely and alone to the commander of the convoy, who gave them such instructions. The convoyed ships and cargoes cannot, in consequence, be confiscated because they have resisted search, and the belligerent Power can alone be authorized to demand that the commander of the convoy should be punished by his government, if he has exceeded his powers.

The Judge must have felt this, as in one place (page 31) he says, that it does not alter the case that the captors have not proceeded against the frigate, although most culpable, ("the principal wrong-doer,") he adopts a language here as if the mildness of the British Government alone had caused an exception to her advantage ; as on the contrary, proceedings might as well have been instituted in the Admiralty against the frigate, as the merchant ships, and condemnation have taken

place as well of one, as the other. Notwithstanding that this tribunal has frequently pronounced singular sentences, I much doubt if it would take upon itself a jurisdiction over the ships of war and officers of a Sovereign Prince. It would indeed be the first sentence of its kind in the world.

Having thus established that the so termed usual or common principles, on which the sentence is founded, are altogether erroneous, I shall now examine if the circumstances attending the capture speak more clearly as to the justice of the sentence.

When Captain Lawford made the singular demand of visiting the Swedish merchant ships, the commander thereof communicated to the former the instructions of his Court which imposed the duty upon him of not permitting any such visitation; to remonstrate against it, and in case of necessity, to oppose force to force. These instructions clearly prove that the commander of the convoy, by resisting search, did not act of his own accord, but in pursuance of the positive orders of his government. The interpretation that one or more advocates, during the hearing of the cause, have been willing to give to this instruction, that it solely applied to the Tunisian states, is properly rejected in the sentence, since

it is as evidently contradicted by the words of the instructions, as *ipso facto*. If every argument in the sentence were equally correct, I should certainly not take upon myself to dispute it. It would, doubtless, have been better if this exception had on no account been supposed, because it might easily be interpreted as an acknowledgment on the part of Sweden, that the conduct of England, in searching the ships, was legal, and that of the Swedish commander in chief, in resisting the required search, on the contrary, illegal; unless indeed it be considered as a satirical hint, that on the part of Sweden it was not expected that resistance would be necessary, in order to avoid search and detention, against any others than the Tripolitan cruizers. After the communication of the Swedish instructions, the whole case of visitation was completely of a public nature, which by no means was calculated for a legal procedure, but solely a ministerial affair, to be settled between the British and Swedish Courts. As after this true representation of the case, it must be evident that the masters of the vessels under convoy could not be proceeded against, since they acted agreeably to the instructions of the commander in chief; so also the commander himself cannot be called to account, or complaints made against his conduct, not only because he cannot be judg-

ed by a British Court of Admiralty, but because he acted agreeably to the orders of his Court. It was consequently the Swedish Government which the English had immediately to complain of, and to which it had solely to address itself, if Sweden really had acted against the neutrality it professes; which, however, (as heretofore fully proved,) was by no means the case. What the advocates on the part of the Swedish merchant ships ought to have done on behalf of their employers, should have been immediately to have insisted on the cause being rejected, as the British Admiralty was incompetent to judge of it; and if it, notwithstanding, proceeded to absolute sentence, it should, agreeably to the strict principles of justice, be held as absolutely null and void. This error might possibly still be amended, either by one of the private injured individuals demanding restitution or compensation of the English Government, which its justice will hardly refuse, if the application be made in time; or by an appeal to the Privy Council, which, as far as I know, constitutes the superior tribunal in prize causes, in order there to obtain the reversal of the sentence.

The other observation which I must make, is, that the declaration of the chief of the convoy, as to the destination of the ships and cargoes, was

in every respect correct, as was subsequently proved, after the detention of the vessels. There has, consequently, not been any personal error committed on the commander's side, which in any way can, although *ex post facto*, justify the proceeding.

I must further finally observe, that there has not been such a resistance to search, as could carry with it the confiscation of the Swedish merchant ships, if they had not been under convoy, supposing that the afore-mentioned maritime laws at any time have been, and are yet legally exercised. All these laws pre-suppose fight and active resistance; but even in the data of the sentence itself, these have not occurred in the present case. The commander of the convoy has alone threatened to use force, and made preparations for battle, but not fired a single shot; and the mere refusal of visitation, or threat, does not authorize a confiscation of any merchant ship, agreeably to the true interpretation of the laws of capture (*caper.*) In all good criminal laws a considerable difference is made with respect to the punishment, between a threat and the actual commission of a fact; and for this plain reason, because, for the most part, those who threaten, do not carry their threats into execution. In conformity with our laws, a threat,

unaccompanied with absolute injury, is rarely punished; one is solely attentive to secure the threatening person by arrest, from which he may be released on finding bail.

The English legislature equally distinguishes such cases.* The more extraordinary it appears, therefore, that an English Judge should put the threat of using force, in the same class as actual resistance, and adjudge for it the same effect of the law, to wit, confiscation of ship and goods. The only circumstance which may be looked upon as actual resistance, and to which, therefore, the Judge principally refers, is, that a British officer who had gone on board one of the Swedish vessels to take possession, was, by an armed force taken out of the ship, in pursuance of the Swedish commander's order, and carried to his frigate, where he for some time was detained.

On the other hand, it must be recollected, that when one even lays aside the illegalities of the visitation, the consequence of these being merchant vessels sailing under convoy, which were visited, one might at least demand that those formalites should have been observed, which are

* See Blackstone's Commentaries on the Laws of England, book iii. chap. 8, l. 2, 3, in the 10th edition, Lond. 1787, page 120.

imposed on every cruizer who exercises this right against a merchant ship. In this instance, the so termed visitation was, on the contrary, an absolute act of violence ; armed boats were sent out during the night, (the time fully shewed the illegality of the transaction), in order to *take possession* of the ships, not in a legal manner to search them. An illegal forced search, or rather *possession*, which, as taking place in the night, was, in a certain degree, disavowed by the Commanding Officer, under whose authority it was executed, and, as such, on no account required to be respected. To use force against such open violence cannot be termed illegal resistance, which in any case can carry with it, agreeably to the obligations of the cited maritime ordinances, and privateering instructions, confiscation of the vessel ; this is so evident, that even the French writer, Valin, who favoured the caper-system so much, declares, that when a cruizer has not hoisted the colours of his nation, whilst attempting to search a merchant ship, consequently the act committed during day-time, resistance on the part of the master of the vessel is completely lawful, and the established confiscation cannot take place ; this active resistance, therefore, exercised by a single ship, even in case of its being as illegal as it was legal, could only have been esteemed a transgression of this one, and not of the other vessels.

I shall pass over a recital of the other circumstances which prove an illegal conduct in this affair, such as not taking immediate possession of the ship's papers, consequently seizing the vessels before they were searched; that proceedings were instituted long after the capture, that one merchant ship has been restored although they were all similarly circumstanced, that the process has been extremely protracted, with other irregularities, as acknowledged by the Judge himself, but which, to me, who only examine into the principles established in the sentence, and which might be of consequence to futurity, are not immediately interesting.

I have thus (as I conceive), by incontrovertible arguments, established, that the refusal of search cannot be esteemed a legal cause for confiscating the escorted Swedish merchant ships, and that chiefly on the following grounds:

1. THE RIGHT OF VISITATION is not founded on the natural, but conventional law of nations; it cannot, therefore, be extended further than it is acknowledged.

2. It has not been acknowledged with respect to merchant ships, sailing under convoy of ships of war.

3. Such an acknowledgement would even be contradictory, as it would suppose a declaration on the part of the neutral Government that it did not deserve any confidence.

4. The belligerent Power cannot reasonably complain on this subject, as it, in this case, has the same security, nay, even more, that the trade, which is carried on by neutral subjects, is legally transacted, as cruizers are bound, with respect to ships not under convoy, to limit their search to the sea-passes, and ship's documents.

5. A visitation of this description, pointedly militates against the most recent treaties.

6. The belligerent Powers have themselves, even in their regulations to cruizers, (*"caper reglemens"*), acknowledged the illegality of a search of this nature.

7. A forcible resistance of search by an unconvoyed merchant ship, cannot, agreeably to the accustomary law of nations, and as little from treaties, carry with it the confiscation of the ship, much less that of the cargo, but only that the party so resisting must suffer the inconvenience attending his conduct. Some few partial sea ordinances specify, indeed, the confiscation of the

vessel, if after a legally required visitation actual forcible resistance is made, but not in any other case.

8. A simple refusal of visitation, unaccompanied by any active resistance, has no effect by law.

9. Convoyed merchant ships can so much the less, on this account, be liable to confiscation, as their masters do not act from their own authority, but, during the voyage, are under strict military subordination to the Commander of the convoy.

10. The detained Swedish vessels ought not to be confiscated, as they have not made an active resistance, and if they had, it could not be laid to their charge; as they therein, in such case, would only have followed the orders of the Commander in Chief.

11. The whole affair is on no account qualified to undergo judicial proceedings, but should be decided through the mediation of the two Courts, as it has been clearly shewn, that the commanding Swedish officer acted consonantly to the positive orders of his Government.

We must now examine, if there perhaps may be found a *material* ground for confiscating the detained ships, together with their cargoes, such an one being stated, as that the ships were laden with warlike contraband stores, to wit: ship timber, hemp, pitch, and tar.

I have already remarked, that, agreeably to the natural law of nations, no warlike contraband stores can exist, as the neutral State should be left at liberty to sell as well warlike stores as other goods to the belligerent Powers; observing, however, that in this respect, a strict impartiality be maintained, and that it be equally ready to engage with either party in such traffic, as war does not alter the position of a neutral Power with respect to belligerents; and as the trade that was lawful before a war, must remain so during hostilities. It is, consequently, a limitation founded solely on the positive law of nations, that the exportation of certain goods to the enemy, under the name of warlike contraband stores, is prohibited. As this limitation is merely conditional, it cannot, by the belligerent Powers, be extended further than treaties, and usually admitted customs among civilized nations authorize, without infringing the rights of neutral States.

When the principle had been adopted in the

last century, that free ship made free goods, it was at the same time determined, that a ship of this description was not to be laden with contraband goods, in which were reckoned solely those *that directly, and in their actual unalterable form*, could serve for warlike purposes, such as gunpowder, ammunition, guns, and nothing else. The treaties which Portugal concluded in 1642, and 1654, with England, and 1661, with the United Netherlands, permitted even her then existing enemy, Spain, to be supplied with arms and ammunition, provided they were not exported from Portuguese ports. Spain allowed the Hanseatic towns a similar liberty, in a treaty concluded with them in 1647. Other treaties, at that period, prohibited the direct exportation of such articles to the enemy; but the prohibition was not extended further than to the actual necessities of war.

The United Netherlands concluded a treaty in 1667, with Sweden, in which it was specifically determined, that not only money, corn, wine, and oil, but likewise iron, copper, cast metal, hemp, cables, planks, pitch, and tar, were declared free goods. The commercial treaties of Holland, in the last century, with France, Spain, and Denmark, contain similar declarations with respect to contraband stores. After

the trade of Holland had been frequently disturbed by the English in maritime wars, the commercial treaty of 1668 took place, which was a consequence of the Breda treaty, that nothing but actual manufactured arms, and warlike implements, should be considered as prohibited during ensuing wars. The same declaration was renewed in the subsequent treaty of 1674. The treaty between England and Spain, in 1669, (which has since been confirmed), declares, in the 24th and 25th articles, only arms and ammunition to be contraband, and all other articles to be free*. The treaty between England and France, of 1677, as well as those of a later period, determines the same. Similar declarations are contained in the treaties between Great Britain and Russia, of 1753 and 1766. Of the treaties made by England with Denmark and Sweden, (which in several points differ from those general principles), I shall hereafter take notice.

From all these treaties, to which I could easily add others, one is fully authorized to conclude, that it is an allowed principle in the conventional law of nations, that such goods alone shall be

* Vide Extracts from several Treaties subsisting between Great Britain and other Kingdoms and States, of such articles and clauses as relate to the duty and conduct of the Commanders of his Majesty's ships of war. The 3d edit. Lond. 1758, p. 89 and 90.

esteemed contraband, of war, which immediately, and in their actual form, are destined for warlike purposes ; and that the few treaties in which the rule is extended further, must be deemed special exceptions, which can alone be binding on such States as have consented thereto.

Even in the ordonnance of Louis XIV. which contains such various and strict rules respecting neutral commerce in time of war, it is declared, that arms, powder, ball, and other implements of war, as horses, and their equipages, which are destined for the use and benefit of the enemy, shall alone be confiscated in whatever ships they may be found*. The same is again repeated in the Regulation of 21 Oct. 1744, and in that of 26 July, 1778, art. 1. Condemnation is alone extended to the contraband articles, and on no account to the vessel, unless, agreeably to the last specified regulation, they appear to exceed three-fourths of the value of the cargo.

The English, in the mean time, sought, in their maritime wars (relying on their prepon-

* Ordonnance de la Marine, liv. iii. tit. ix. art. 11. Les armes, poudres, boulets, et autres munitions de guerre, même les chevaux et équipages qui seront transportés pour le service de nos ennemis, seront confisqués en quelque vaisseau qu'ils soient trouvés, et à quelque personne qu'ils appartiennent, soit de nos sujets ou alliés.

derating power), to extend the contraband articles of war as far as possible, in order thereby to distress their enemies to the utmost of their power. They insisted, that not only that which directly and in its actual form served for the purposes of war should be considered as contraband, but likewise that which indirectly served for such purposes, and might equally be applied to private uses, as ship-timber, masts, cables, hemp, pitch, and tar, and even provisions. From want of argument to justify these encroachments on the rights of neutrals, they at times referred to the peculiar nature and circumstances of the war, and occasionally to the Roman and Canon law. The fallibility of the first argument has been clearly proved by the preceding pages ; the others are equally insufficient. The Roman or Canon laws have never been considered as a general code of laws for the world at large, (*"folke-codex"*), (although it is not denied that respect for these laws has occasioned various determinations in the accustomary law of nations), but much less can they be deemed so in our enlightened times, when their respectability has been so much diminished. In this case, any citation of, or reference to them, is so much the more inapplicable, as the Roman Emperor's prohibition extended only to his own subjects*, not to fo-

* L. 4, Dig. ad leg. Jul. Majest. (lib. 48, Tit. 4), lege Julia tenetur --- --- --- cujus operâ dolo malo hostes populi Romani

reigners, in the same manner as that of the Pope expresses, that Christians shall not traffic in various commodities with the unbelievers, with whom warfare was carried on in the so called crusades†. Such grounds or arguments simply shew, therefore, that whoever uses them feels the weakness of his own cause.

The conduct of Great Britain in this respect, was, in the mean time, sensibly felt by the Northern Powers, whose chief commerce consisted in naval stores, and in such merchandizes as Great Britain, contrary to treaties and common customs, considered as military contraband articles. Denmark and Sweden have thus, at different periods, found themselves obliged, by alliances and reprisals, to put a stop to these irregularities; this likewise gave rise to the armed neutrality in the American war. Amongst the principles adopted on this occasion, was this, that no other goods should, by a belligerent Power, be reckoned contraband, than those which directly and in their actual form are destined for the prosecution of war, and which are specified *commeatu, armis, telis, equis, pecunia, aliave qua re adjuti erunt. C. 1 et 2, Cod. quæ res exportari non debent, (lib. 4. tit. 41.)* prohibita subjects carrying provisions and arms to barbarians, by reason that they were dangerous to the Romans.

* C. 6, X. de Judæis Extravag. Comm. eod. tit. c. 2.

in the 10th and 11th articles of the commercial treaty between Russia and Great Britain, except where any special treaties and conventions with one or other Power might expressly contain a different determination. The 10th article in the treaty referred to, declares all trade to be free, that excepted which consists in military stores, or is destined to blockaded ports. The 11th article particularizes as contraband, cannons, mortars, musquets, pistols, bombs, grenades, balls, flints, flint-stones, matches, gunpowder, saltpetre, brimstone, cuirasses, pikes, swords, cartridges, belts, saddles, and harness, when they are found to consist of more than is requisite for the use of the ship, crew, or passengers. Such contraband articles as might be found, were to be confiscated, but neither the ship, passengers, nor the remaining part of the cargo were to be detained, or prevented from continuing the voyage*. All the Powers which entered into the armed neutrality, adopted these principles; they were acknowledged by the belligerent Powers, France, Spain, and Holland, and England itself did not openly dare to dispute them. Subsequent to that period, every treaty contains an explanation relative to military contraband articles, in conformity with that declaration. Great Britain has even itself since the

* Marten's Receuil, t. i. p. 145, 146.

American war, concluded treaties, in which military contraband articles are particularized agreeably to this just principle alone, which excludes all optional explanations. On this footing is shaped its treaty with France of 26th Sept. 1786, art. 22 and 23*, and the treaty with Russia, dated London, 25th March, 1793, art. 4, which confirms the former of 1766†. In the first treaty alluded to, it is particularly specified that all naval stores, as well as iron, hemp, pitch, and tar, shall be free and lawful goods. The 28th art. declares, that military contraband articles shall alone be confiscable, but that the ship and the remaining part of the cargo shall be restored; and when the captain offers to surrender up the prohibited goods, he shall, on no account, be prevented from continuing his voyage.

If, therefore, any generally admitted principle is given to the conventional maritime law of nations, it must be this, that no other goods shall be looked upon as military contraband, than those that directly and in their actual form can serve for the carrying on of hostilities, or, in other words, arms and ammunition for war, unless special treaties declare the contrary, as in such cases the well-known rule must prevail—*volenti non fit injuria*. Herein an exception can

* Marten's Recueil, t. xi. p. 694, 695. † Ib. t. v. p. 210.

only be made of brimstone and saltpetre, as reckoned military contraband articles, the reason of which doubtless is, that they, without much art, can be fabricated into the now first and most essential necessary article in war, namely, gunpowder. It is therefore incomprehensible how so experienced a man as Sir William could advance as a decided point, "that during the present period, hemp, pitch, and tar, are reckoned as contraband, although, he says, they were not esteemed so at the time England concluded her treaty with Sweden in 1661, or at least in the year 1651, in which, under Cromwell's protectorate, a treaty was concluded, which served as a basis to the other;" when it on the contrary is in our times an axiom, that articles which indirectly serve for carrying on a war are not to be deemed contraband, and England herself, in her recent treaties, has not declared them as such. It would therefore be singular to declare hemp, pitch, and tar, to be contraband, and, on the contrary, not iron, an article of so much consequence for the carrying on of war; and the Judge does not permit himself to include under this denomination the iron with which the detained Swedish vessels were equally laden. It would likewise excite a well-grounded astonishment, if, in the middle of the last century, one had, in a more reasonable and explanatory man-

ner specified what should be considered as contraband, than in the present times, as it is clear that if one was to add such articles as, subsequent to their being manufactured, would become applicable to warlike purposes, neutral commerce would be exposed to the greatest chicaneries, as no decided rule could be established for the so termed contraband articles, and they might be extended at the option or caprice of the belligerent Power.

The only grounds upon which the Judge rests this singular pretension, are a passage of Valin, where this writer declares, that naval stores, during the present period, and from the commencement of this century, are justly deemed contraband; which, however, formerly were otherwise; a similar declaration of Vattel, specifying naval stores as contraband articles; and lastly, an explanatory article in the commercial treaty between Great Britain and Denmark, in 1780.

With respect to Valin's work, it must previously be remarked, that it was written before France took a part in the American war, and before the armed neutrality concluded certain immoveable principles with respect to contraband, which subsequent to that period have been ob-

served in all treaties, (that between England and America excepted,) so that an error in respect to this point, is in him more pardonable than in the present Judge. It must further be observed, that the data upon which Valin, in his *Nouveau Commentaire sur l'Ordonnance de la Marine, de 1681*, founds his statement, are, that France, in the year 1700, declared tar to be contraband, though with the exception of what might be found on board Swedish ships, as it was the production of that country; and because the treaty with Denmark, of 23d August, 1742, declares pitch, sail-cloth, hemp, cordage, masts, and ship-timber, should be likewise esteemed as such.* These single instances, (whereof the first moreover was only temporary, and served for the purpose of exercising reprisals against England,) are not of that importance as to serve as a basis for any principles of the accustomary law of nations: by comparing Valin's conclusion with his own premises, the Judge of the Admiralty might easily have discerned, that it could not be admitted. Nor is it known to me, that the French tribunals have ever considered other articles as contraband, than those which the maritime ordinance of 1681 built in this respect, on regular principles, declares to be such, unless

* Vol. ii. p. 264.

the treaty with one or other Power authorizes it. The conduct of France in the American war shews the reverse, for she took a part in this war, according to the specific declaration of her Court, solely to defend the liberty of maritime commerce, which England, in her opinion, had violated. When the Northern Powers firmly defended the same principles, the French Government formally announced, in official letters to the commander in chief of its fleets, and members of the Admiralty, dated the 23d May, 30th May, and 7th August, 1780,* amongst other matters, that neutral ships, and, in particular, Russian, Swedish, Danish, and Dutch vessels were not to be molested or detained, unless they were destined to the enemy with contraband stores, among which were solely to be reckoned, arms of all descriptions, and warlike ammunition.† The French Government faithfully observed this principle after the conclusion of that war, in all the late treaties which were concluded previous to the revolution; as with America, England, Russia, Mecklenburg, and Hamburg, so that Sir William cannot, from the

* Inserted in the *Code des Prises*, imprimé par ordre du Roi, à Paris, 1784, 4to. vol. ii. p. 867, 68; p. 875, 76; and 886, 87.

† The words are, "dans le cas où ces bâtimens porteroient à l'ennemi des marchandises de contrebande, telle que des armes, de quelque espèce que ce soit, ou munitions de guerre."

conduct of this Government, find any authority for his sentence.

It must be remarked, with respect to Vattel's expression, that naval stores, agreeably to the more recent accustomary law of nations, were contraband ; that his work came out in London in 1758, consequently at a period when the nations in general had not come to an agreement as to any regular well understood principles in this respect, and when at least these far extended demands of England and the concessions of France, (which appeared in the treaty with Denmark of 1742,) were in a state of uncertainty.

Had Vattel written his work after this affair, by more modern examinations, had been investigated, and after that, in consequence of the armed neutrality, it had been acknowledged as a general law, that that alone shall be deemed contraband which in its actual state serves for the purposes of war, he would have avoided this mistake. He himself in other respects remarks, that the former conventional law of nations was much more favourable to neutrals, than that which prevailed in his times, as it only specified that contraband goods might be seized, and their value paid by the belligerent Power ; he himself

makes use of doubtful terms in determining what at that time was the actual custom.* It may be supposed how very uncertain Vattel's principles of what, in consequence of custom, shall be deemed contraband, are, as he likewise adds the necessaries of life, in case the belligerent Power trusted in the being able to starve out his enemy. He seems to contradict himself when he at once adopts the idea, that a neutral state can sell warlike stores to the belligerent in its own territory, and at the same time that it is illegal for private individuals to carry the same to him, even to naval stores, notwithstanding that the neutral government openly takes a greater interest in the first than in the second species of trade: if Vattel alone refers to custom, the contradiction falls to the state, and not to his account; in the mean time an author of a work, whose greatest object is to unravel the everlasting and invariable principles of the natural law of nations, should have been particularly attentive to this evident contradiction. One can scarcely avoid suspecting that in respect to land wars, he is speaking in defence of his Swiss countrymen; and as to maritime wars, of the English, with whom he resided.

* *Les Coutumes de l'Europe, paroissent aujourd'hui d'être généralement fixées, &c.*

The explanatory article of the treaty between Denmark and England, of 1670, which is dated St. James's, the 4th, and Fredensborg, the 21st of July, 1780, actually determines, that not merely arms and ammunition, but likewise timber for ship-building, tar, pitch, sheet-copper, hemp, and cordage, and generally whatever may serve directly for the equipment of vessels, (unwrought iron, or copper, and fir planks excepted,) shall be declared contraband.* This particular determination, which militates completely with the principles the Danish Government otherwise professes, and particularly at that time contended for, it being the epoch of the armed neutrality, was doubtless occasioned by a previous treaty with France, containing similar stipulations, and it was feared that the British Government might accuse the Danish of partiality towards France, if it allowed the exportation of the above-mentioned articles to that state, when it had bound itself not to export them to the enemies of France. From this representation it may easily be perceived, that this explanatory article (which alone arose from an accidental circumstance) cannot

* Vide Henning's Collection of State Papers during the maritime wars of 1776 to 1783, Altona, 1785, p. 100, 104, where it may be found in the original French, as well as in the German, Danish, and English translations: and Claussen Recueil des Traités, sous le règne de Chrétien VII. p. 140, & 141.

be used to prove the extraordinary pretension that hemp, pitch, and tar, agreeably to the new accustomed law of nations, are to be deemed contraband. That the Danish Government, in other respects, does not consider them in this class, is not only proved by its accession to the armed neutrality in 1781, but likewise by all those treaties which have subsequently been concluded.

I will here only cite the treaty with Russia, of ⁵~~17~~ Oct. 1782, art. 21 and 22, where arms and positive ammunition are declared contraband, and all other articles, those excepted which are specifically named, are pronounced free, and the exportation thereof to the enemy allowed as lawful.* And the treaty with Genoa, of 30th July, 1789, art. 6 and 7, in which, likewise, hemp, tar, pitch, and other naval stores are expressly declared free and lawful.† Other com-

Vide this treaty in Martin's Recueil, t. 11, p. 293 and 294, and in Claussen Rec. p. 180, 183.

† Marten's, l. c. t. iv. p. 537: Claussen, l. c. p. 254. This treaty is included in a collection of ordinances for 1792. The words are as follows: "on n'y comprendra pas non plus le Goudron, ou poix résiné, les voiles et toiles d'olonne, chanvres et cordages; ni le bois de construction et de charpente, ni le fêr, l'acier le laiton et tout ce qui peut être fabriqué de ces métaux, lesquels sont tous des marchandises permises, qui pourront toujours se vendre et transporter comme les autres marchandises, même aux lieux tenus et occupés

mercial states have made similar declarations. In the new Prussian code, §. 203, arms and ammunition are alone declared contraband; and on the contrary, masts, ship-timber, ropes, sail-cloth, hemp, pitch, corn, and other materials, which could be *converted* into the necessities of war, as well as horses, are not reckoned among the prohibited articles.

But even if hemp, tar, and pitch really in general could, agreeably to the now esteemed conventional law of nations, be looked upon as contraband, (which I have shewn to be in no wise the case,) yet such articles can on no account be classed as such, if British cruisers should find them on board Swedish ships, by reason of the treaty still existing between England and Sweden, dat. London, 1 Oct. 1661, which has been further confirmed and approved in the subsequent treaties, dated London, 21 Oct. 1664, and Stockholm, 1 March, 1665.

The treaty of 1661 specifies, in the 11th article, what articles the contracting Powers, in case of hostilities, should consider as contraband, and might not be exported to the enemy; they are as

par un ennemi d'une des Puissances Contractantes, pourvu que ces lieux ne soient pas assiégés ou bloqués."

follows : “ money, provisions, arms, bombs, with their fusees and other appurtenances, fire-balls, gunpowder, matches, cannon-ball, spears, swords, lances, pikes, halberts, guns, mortars, petards, grenadoes, musket-rests, helmets, head-pieces, breast-plates, coats of mail, commonly called cuirasses, and the like kind of arms, soldiers, horses, with their furniture, holsters, belts; nor any other instruments of war ; nor ships of war, or guard-ships, be carried to the enemies of the one confederate, under the penalty of being made prize without hopes of redemption if they are seized by the other confederate.”

From this specification it may be seen, that if money and provisions be excepted, arms and ammunition only are to be considered as contraband by this treaty, and ships prepared for war or convoy, but on no account naval stores.

This treaty, as truly observed by Sir William, is in a great measure founded on one antecedently concluded between Queen Christina and the Protector of England, Oliver Cromwell, in 1654, and which was settled on conditions, as wished by the Swedish Court, it being of consequence to the Protector to gain the friendship of Sweden, in order to have a balance opposed to Holland and Denmark, which in part openly, in part se-

cretly, supported the son of the unfortunate King Charles I. afterwards Charles II. (as is more particularly related by the English minister, Whitlocke, in his printed report). Sweden, in consequence, without restriction, claimed the right of exporting to the enemies of England all her productions, as iron, copper, timber, masts, hemp, pitch, and tar; whilst money, on the contrary, was to be esteemed contraband: (by which England, and not the commerce of Sweden, was inconvenienced,) as this prohibition was beneficial to Sweden, in case it should be involved in a war with the impoverished powers of Russia or Poland.

Sir William indeed acknowledges that at the time the commercial treaty was concluded between these kingdoms, hemp, pitch, and tar were not considered as contraband; but he, at the same time, insists, that they are now esteemed as such, and therefore, even in Swedish ships, may justly be confiscated by the British Admiralty. The grounds, on which this pretension is built, have been already sufficiently confuted. The explanatory article of the treaty with Denmark, binds this Power alone, but not Sweden. Why does not the Judge of the Admiralty rather compare the treaty with Sweden, to the one England has concluded with Russia, with which

country Sweden, with respect to its commercial products, bears such a close similitude? But in this the exportation of naval stores is particularly permitted; no interpretation can besides be conceived more capricious than that made use of by the Judge. Every treaty must, like an agreement between private individuals, be interpreted agreeably to its true meaning, and no other sense can be given to it than what the parties possessed at the time of its being made; if a different idea were adopted, treaties would be illusory, and it would be an useless labour to make them. In case any doubt existed as to articles of this kind being, by the treaty existing between the two nations, regarded as contraband, the interpretation ought, agreeably to the spirit which reigns in it, and the historical circumstance which occasioned it, to be made in favour of Sweden, and not in that of England; but here is no real cause for any existing doubt. The projectors of the treaty have endeavoured to prevent all such misinterpretations, by declaring, at the end of the article, "that it shall be lawful for either of the confederates, or his people or subjects, to trade with the enemies of the other, and to carry them any merchandize whatever (not above excepted,) without any impediment, provided they are not

compare the treaty with Sweden, to the one England has concluded with Russia, with which

carried to those ports or places which are besieged by the other, &c.*

But the treaties of 1664 and 1665, between Sweden and Great Britain, as they are published in Sweden, by an Official Extract, printed at Stockholm, in 1666†, leave not a doubt behind, that the treaty of 1661, must be interpreted verbally; and that those goods which are not specifically prohibited, are on no account to be regarded as contraband. In the first article of the Extract it is settled, “that both Powers have agreed, that in case it should happen that one of them is engaged in a war, the subjects of the other Power shall be at full liberty to trade with the enemy of the confederate, and carry them all such goods as are not particularly excepted in the 11th article of the treaty concluded

* “*Alteri autem confoederatorum ejusve populo subditisve cum alterius hostibus commercium habere, iisque merces quascunque (de quibus supra exceptum non est) advehere licebit, idque sine ullo impedimento, nisi iis in portibus locisque, qui ab altero obsidentur.*

† The whole title is as follows: Extract och Uthtog uthaff dhett som emellau Kongl. Mayst. af Sverige och Kongl. Mayst. af Store Britanien angående Commercierne år affhandlat och bewiliat, jäm-wäl och uthaff höchstbemelte wår allernådigste Konung och Herr för gott befunnit allom Wederbórandom uthaff dess Undersätare uthi Sverige och där under lydande Provincier til effterrettelse att publiceras. Stockholm, 1666, 4.

in London, 1661, and by virtue of the same, expressly declared to be prohibited, or contraband, or are the property of the enemy. *

The following article begins with these words: "And in order that it shall be intelligible to every one who peruses this, what goods are expressly excepted and prohibited, or declared to be contraband, they are herewith particularized from the London treaty. The articles thus described are as follows, &c.†

The Judge of the Admiralty must either not have known, or would not notice, this marked

* The article runs thus in the original Latin "Conventum est, quod hostibus alterius Foederatorum nullæ sunt advehendæ merces, quæ principaliter ad usum publicum spectant; quæ tamen prohibitio nequaquam eo extendenda, ut propterea omnis protinus amicitia et mutus commerciorum usus cum alterius foederati hostibus eorumque subditis omnino tollendus et interdicendus veniat. Nam existente tali casu, quod unus confoederatorum ipsi bello immixtus non fuerit, ejus subditis ac incolis cum hostibus illius foederati, qui in bello versatur, commercia et navigationes liberæ erunt, et iisdem quascunque merces, quæ articulo undecimo tractatus Anglo Svecici Londensis de Ao. 1661, specialiter non exceptæ nec vigore ejusdem expressè pro vetitis seu contrabandæ dictis habitæ, nec hostium propriæ sunt, etiam immediate ad hostes tuto advehere licebit.

† Atque ut constet omnibus, qui hæc introspiciunt, quænam sint specialiter exceptæ ac vetitæ seu pro contrabandis habitæ merces; placuit, ut ex supra nominato Articulo ximo. Tractatus Londinensis hic recenserentur. Sunt itaque istæ specialiter designatæ merces, &c.

addition to the treaty of 1661, which has evidently been made to prevent all enlarged interpretation ; for his justification he refers, on the contrary, to an English sentence of 1750, in which, pitch and tar from Sweden, laden in a Swedish vessel, destined to a French port, were pronounced to be contraband, and confiscable. This only shews, that that sentence was as unreasonable as the present ; but one act of injustice does not sanction another. As much as the English tribunals observe precedent, still these cannot, with reason, be referred to cases which relate to foreign States, and much less when the previous sentence openly militates against the evident words of a treaty. In other respects, the Judge allows, that in more recent times an example does not occur of a condemnation of this description, but only, that England has obliged those ships which were carrying such cargoes to the enemy, to surrender them up, on receiving a reasonable indemnification.

Here are therefore acts, which prove, that the British Government itself does not conceive the conveying such articles to the enemy as legal ground for confiscating the cargo ;—but even this right of pre-emption, or purchase, militates against the treaty with Sweden. Sir William, who otherwise so often cites Valin, should not

have neglected to cite him in this instance, particularly as the passage relating to the case, is connected with that referred to by himself; he reproaches the English by name, that they even considered naval stores as contraband, though such construction is in a direct manner repugnant to the treaty.*

I have before observed, that France, when she, (as equally remarked by Valin), by way of reprisals against England, declared tar, in the year 1700, to be contraband, made an exception to that in Swedish ships, as being the produce of the country; which proves, that at that period, even in England, the carrying it to France from Sweden was not deemed illegal.

If hemp, pitch, and tar, in Swedish ships were really contraband, (which from this representation they can by no means be considered), these articles alone, agreeably to treaty, should have been confiscated in case they were destined to the ports of the enemy; but on no account the other merchandizes, or those that had a different destination, or the ships.—But by the

* Ainsi en cette partie il n'y auroit point à se plaindre des Anglois sans leur contravention aux traités Particuliers. Valin nouveau Commentaire de l'Ordonnance de la Marine, tom. ii. p. 264.

sentence of the Admiralty, the whole is condemned altogether !

I thus hope I have unanswerably proved, that the seizure of the Swedish convoy can on no account be justified from the nature of the cargoes on board the vessels, and that there was as little *material* as *formal* legal cause for condemnation.

The costs the Judge has partly thrown upon the cargoes, and in part upon the claimants. Agreeably to the principles above stated, I, on the contrary, conceive, that the claimants are fully justified in demanding an indemnification for their expences, and full satisfaction for the damage they have sustained in consequence of the seizure and detention.

Should the present investigation in any manner contribute to render the rights of neutral commerce more respected by the belligerent Powers, and the voice of justice in the clamour and tumult of war, more intelligibly heard in cases where the whole property of industrious and peaceable citizens is probably at stake, I should be richly rewarded for the no small labour that has been employed upon this subject ; but this is rather to be wished than expected. My zeal for truth, I hope at least that no one will doubt, as

I, on the other side, most certainly have not called in question the upright intentions, and extensive penetration, of the Judge of the Admiralty; these are conspicuous in his sentence, although, from my own conviction, I can neither approve those principles upon which it is formed, nor the results which flow from them.

FINIS.

A
REPORT
OF THE
JUDGMENT
OF THE
HIGH COURT OF ADMIRALTY,
ON
THE SWEDISH CONVOY,

PRONOUNCED BY
SIR WILLIAM SCOTT,

ON THE ELEVENTH JUNE, 1799,

By CHR. ROBINSON, LL. D. and Advocate, London, 1799.

MARIA, CAPTAIN PAULSEN.

SIR WILLIAM SCOTT. **T**HIS ship was taken in the British Channel in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of Commodore Lawford.

The facts attending the capture did not sufficiently appear to the Court upon the original evidence ; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several attestations made on the part of

the captors, and of a copy of the instructions under which the Swedish frigate sailed, transmitted to the King's Proctor from the office of the British Secretary of State for the foreign department. On the part of the Swedes, some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. On this evidence the Court has to determine this most important question ; for its importance is very sensibly felt by the Court. I have, therefore, taken some time to weigh the matter maturely ; I should regret much, if that delay has produced any private inconvenience ; but I am not conscious (attending to the numerous other weighty causes that daily press upon the attention of the Court) that I have interposed more time in forming my judgment than was fairly due to the importance of the question, and to the magnitude of the interests involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me ; namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of

nations holds out without distinction to independent States, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally *here*, in the belligerent country, according to the known law and practice of nations ; but the law itself has no locality.—It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm ;—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question, a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favour of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war relatively to neutral States in as large a measure as they have been regularly

and legally exercised in, at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare that I consider this as a war in which neutral States themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted—and if authority is required, I have authority—and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced, I mean Baron Puffendorff; the passage to which I allude is to be found in a note of Barbeyrac's on his larger work, vol. viii. c. vi. sec. 8. Puffendorff had been consulted in the beginning of the present century, when England and other States were engaged in the confederacy against Louis XIV. by a lawyer upon the continent, Groningius, who was desirous of supporting the claims of neutral commerce in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:

“I am not surprized that the Northern Powers should consult the general interests of all Europe without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. Those Princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant Power which threatens Europe with slavery, and the Protestant Religion with destruction. This being the interest of the Northern Crowns themselves, it is neither just nor necessary that, for a present advantage, they should interrupt so salutary a design, especially as they are at no expence in the affair, and run no hazard.” In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states. His words are memorable; I do not over-rate their importance when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely without notice, as another preliminary observation, (though without meaning to lay any particular stress upon it,) that the transaction in question took place in the British Channel,

close upon the British coast, a station over which the Crown of England has from pretty remote antiquity always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be adviseable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors, for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain Lawford introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets, he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and

was answered, " that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar." Upon doubts which Captain Lawford entertained respecting the conduct he should hold in a situation of some delicacy, he dispatched immediately a messenger to the Admiralty, keeping the convoy in his view; and having received orders from the Admiralty by the return of his messenger to detain these merchant ships and carry them into the nearest English port, he sent Sir Charles Lindsay and Capt. Raper to communicate them in the civilest terms to the Swedish Commodore, who shewed his instructions to repel force by force if any attempt was made to board the convoy, and that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the British squadron to prepare for battle. In the night, possession was taken of most of the vessels, the Swedish frigate making many movements, which were narrowly watched by the Romney, keeping close under his lee, lower deck guns run out, and every man at his quarters. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by

force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish commander sent an officer of his own on board Capt. Lawford to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate Roads he lamented that he had not exchanged broadsides, said that he did not then consider his convoy as detained, and should resist any further attempt to take possession of them.

Capt. Raper states, that on going on board the Swedish frigate he found all the men at their quarters, and the ship clear for action; that the Commodore shewed his orders, and expressed his firm determination to carry them into execution. Capt. Lawford sent a boat with an officer on board several of the convoy, to desire they would follow into Margate Roads; their answer was, they would obey no one but their own Commodore.

Lieut. M'Dougal describes in like terms the menacing appearance and motions of the Swedish frigate. He was sent to take possession of vessels which would not bring to without firing at them. On his going on board one of them, the master declared that he had orders from his Commadore not to give up the possession of her to any person whatever, and repeatedly drove away by force the British mariner, who by his order took possession of the helm.

Mr. Cockraft is another witness to the same effect; and Mr. Candish, the officer who was taken by force out of the Swedish merchantman. Expressions of strong reproach against the proceedings of the English were addressed to him, and the Commadore protested that if he had not been surprized, he would have defended his convoy to the last.

What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts—That a large number of vessels connected all together with each other, and with a frigate which convoyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports, and others not, with cargoes, consisting amongst other things of naval stores, were met with close

upon the British coast by his Britannic Majesty's cruizers—That a continued resistance was given by the frigate to the act of boarding any of these vessels by the British cruizers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior British force, which overawed it—That the act being effected in the night, by the prudence of the British Commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night—That a forcible recapture of one vessel took place, and a forcible capture and detention of one British officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts. But all this, it is said, might be the ignorance or perverseness of the Swedish officer of the frigate—the folly or the fault of the individual alone. This suggestion is contradicted by Mr. Raper's log, which proves that the merchantmen refused to admit the British officers on board, and declared that they would obey nobody but their own Commadore; a fact

to which Mr. M'Dougal likewise bears testimony. It is contradicted still more forcibly by the two sets of instructions, those belonging to the frigate and those belonging to the merchant-vessels.—The latter have been brought into Court by themselves, and of the authenticity of the former there is no reasonable doubt; for they are transmitted to me upon the faith of one of the great public offices of the British Government, and no person disavows them, and indeed nobody can disavow them, because they were produced by the Swedish captain, who made no secret whatever of their contents. Something of a complaint has been indulged, that the orders from the British Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants, and they were not ordered by the Court, because if the act of the captors was illegal, the orders of the Admiralty would not justify it, and the want of orders would not vitiate if the act was legal. No mystery however was made about these, for the communication of orders and instructions was mutual and unreserved. It is said that the instructions to the frigate are intended only against cruizers of Tripoli, and an affidavit has been brought in to shew that that Government had begun hostilities against the Swedes. The language, however, of these instructions is as universal as language possibly

can be ; it is pointed against the " fleets of any nation whatever." It is however said that this was merely to avoid giving offence to the Tripoli Government. But is the Tripoli Government the only Government whose delicacy is to be consulted in such matters ? Are terms to be used alarming to every other state, merely to save appearances with a Government which, they alledge in the affidavit referred to, had already engaged in unjust hostility against them ? There is, however, no necessity for me to notice this suggestion very particularly, and for this plain reason, that it is merely a suggestion neither proved nor attempted to be proved in any manner whatever ; and the *res gesta* completely proves the fact to be otherwise, because it is clear that if it had been so, the commander of the frigate must have had most explicit instructions to that effect. They could never have put such general instructions on board, meaning that they should be limited in their application to one particular state, without accompanying them with an explanation either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use. Whereas nothing can be more certain than that he was left without any such restrictive instructions ; he therefore acts, as any other man would do, upon the natu-

ral sense and meaning of the only instructions he had received. On this part of the case, therefore, the question is, What is it that these general instructions purport?

The terms of the instructions are these—they are incapable of being misunderstood: “In case the Commander should meet with any ships of war of other nations, one or more of any fleet whatever, then the Commander is to treat them with all possible friendship, and not to give any occasion of enmity; but if you meet with a foreign armed vessel which should be desirous of having further assurance that your frigate belongs to the King of Sweden, then the Commander is, by the Swedish flag and salute, to make known that it is so; or if they would make any search amongst the merchant vessels under your convoy, which ought to be endeavoured to be prevented as much as possible, then the Commander is, in case such thing should be insisted upon, and that remonstrances could not be amicably made; and that notwithstanding your amicable comportment the merchant ships should nevertheless be violently attacked, then violence must be opposed against violence.” Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension:—“If you meet with the cruizers of

the belligerent States, and they express an intention of visiting and searching the merchant ships, you are to *talk* them out of their purpose if you can,—and if you cannot, you are to *fight* them out of it.” That is the plain English, and, I presume, the plain Swedish of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchantmen? That they were acted upon is already shewn in the affidavits which I have stated;—that they were deliberately accepted, appears from their own instructions, which exactly tally with them. These instructions declare, in express terms, “that all merchant ships, during the time they are under convoy of his Majesty’s ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats shew an intention of coming along-side, the merchant ships are to sheer from them.” It appears from the attestations that the obedience of these merchantmen outran the letter of their instructions.

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act—an act common to all the parties con-

cerned in it ; and of which every part belongs to all ; and for which all the parties, being associated with one common intent, are legally and equitably answerable.

This being the *actual* state of the facts, it is proper for me to examine, 2dly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations ; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture ; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be cap-

tured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right, at least, for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally

perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist.

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force, cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble, (with all due reverence be it spoken), it would very much resemble an opposition of illegal violence to legal right. Two Sovereigns may unquestionably agree (if they think fit) by special covenant, that the presence of one of their armed ships along

with their merchant ships shall be mutually understood to imply, that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality ; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no Sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, has thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant : the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance ; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which

nations may perhaps REMEMBER to *forget* them, when they happen to be themselves belligerent), no reverence is due to them : they are the elements of that system which, if it is consistent, has, for its real purpose an entire abolition of capture in war,—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were, fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized States, and urging, at the same time, a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expence of the constant hazard of the harmony of States, and of the lives and safeties of innocent individuals.

3dly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public

law. In Book III. c. vii. sec. 114, he expresses himself thus : “ On ne peut empêcher le transport des effets de contrebande, si l’on ne visite pas les vaisseaux neutres que l’on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents tems de se soumettre à cette visite, *aujourd’hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.*” And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded), but of the private jurisprudence of most countries in Europe,—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated French ordinance of 1681, now in force, art. 12, “ That every vessel shall be good prize in case of resistance and combat :” and Valin, in his Commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the resistance alone is sufficient. He refers to the Spanish ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, “ In case of resistance or combat.” And recent instances are at hand and within view, in which

it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the Institutes of our own country respecting matters of this nature, is in the Order of Council, 1664, article 12, which directs, "That when any ship, met withal by the Royal Navy, or other ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize;"—a similar article occurs in the Proclamation of 1672. I am aware, that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord Clarendon*. But the article I refer to is not of those he reprehends, and it is observable that Sir William Wiseman, then the King's Advocate General, who reported upon the Articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying, that it was the rule, and the undisputed rule of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by

* Lord Clarendon's Life, p. 242.

considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a State may recede from its extreme rights, and that its supreme Councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, That by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruizer, is followed by the legal consequence of confiscation.

3. The third proposed inquiry was, whether any special circumstances preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles.

The first ground of exemption stated on the

part of the claimants is the treaty with Sweden, 1661, article 12, and it was insisted by Dr. Laurence, that although the belligerent country is authorized by the treaty to exercise rights of inquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or "there is any other just and strong cause of suspicion," then the ship is to undergo search. The treaty, therefore, recognizes the rights of inquiry and search, and the violation of those rights is not less a violation of the treaty than it is of the general law of nations. It is said that the demand ought first to have been made upon the frigate: I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship travelling along with merchant ships, is not a *casus fœderis* or that is at all so provided for in the treaty; however, if it is a rule, it was complied with in the present instance, and the answer returned was, that "they were Swedish ships bound to various ports in the Mediterranean,

laden with iron, hemp, pitch, and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of sending on board each particular ship for their several papers; for each particular ship, without doubt, had its own papers: the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp going to the enemy's use are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making *that* treaty which is the basis of it, I mean the treaty in which Whitlock was employed in the year 1651. For I conceive that Valin expresses the truth of this matter, when he says, p. 68, "*De droit ces choses*, (speaking of naval stores,) "*ces choses sont de contrebande aujourd'hui &*

depuis le commencement de ce siècle, ce qui n'étoit pas autrefois néanmoins ;” and Vattel, the best recent writer upon these matters, explicitly admits amongst positive contraband, “ les bois & tout ce qui sert à la construction & à l’armement de vaisseaux de guerre.” Upon this principle was founded the modern explanatory article of the Danish Treaty, entered into in 1780 on the part of Great Britain by a Noble Lord*, then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion, that although it might be shewn that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and that therefore a discreet silence was observed respecting them in the composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe has given upon this subject would in some degree affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions then more generally prevailing in Europe had placed it. Certain it is, that in the year 1750 the Lords of Appeal in this country declared pitch and tar, the produce of Sweden,

* The late Earl of Mansfield.

and on board a Swedish ship bound to a French port, to be contraband and subject to confiscation, in the memorable case of the Maids Goede Help. In the more modern understanding of this matter, goods of this nature being the produce of Sweden and the actual property of Swedes, and conveyed by their own navigation, have been deemed, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-occupancy and pre-emption, or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual justice. Thirdly, another right accrued, that of bringing in for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, even *those* which professed to carry cargoes with a neutral destination. Was there or was there not the just and the grave suspicion, which the treaty refers to, excited by the circumstances of such a number of vessels with such cargoes intended to sail all along the extended coasts of the several public enemies of this kingdom, under

the protection of an armed frigate associated with them for the very purpose of beating off by force all particular inquiry? But supposing even that there was not, is this the manner in which the observance of the treaty or of the law of nations is to be enforced? Certainly not by the treaty itself, for the remedy for infraction is provided in compensations to be levied and punishments to be inflicted upon delinquents by their own respective sovereigns, article 12. How stands it by the general law? I don't say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruizer grossly abusing his commission; but where the utmost injury threatened is the being carried for inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself, (and an armed vessel has not a right to say for it,) "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance, whether *it* is rightly detained, and to act upon that judgment to the extent of using force?—surely nothing but battle and bloodshed, as often

as there is any thing like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? How far the peace of the world will be benefited by taking the matter from off its present footing and putting it upon this, is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals, whose noblest office (and I hope not the least acceptable to them) is to relieve by compensation inconveniences of this kind, where they have happened through accident or error, and to redress by compensation and punishment injuries that have been committed by design.

The second special ground taken on the part of the claimants was, that the intention was never carried into act. And I agree with Dr. Laurence, that if the intention was voluntarily and clearly abandoned, an intention so abandoned, or even a slight hesitation about it, would not constitute a violation of right. But how stands the fact in the present case? The intention gives way, so far as it *does* give way, only to a superior force. It is for those who give such instructions to recollect, that the averment of an

abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions, and the sailing under them, were sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences! If he meets with a superior force, he abandons his hostile purpose! If he meets with an inferior force, he carries it into complete effect! How much is this short of the ordinary state of actual hostility! What is hostility? It is violence where you can use violence with success; and where you cannot, it is submission and striking your colours. Nothing can be more clear upon the perusal of these attestations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The

resistance is carried on as far as it can be ; and when it can maintain itself no longer, *fugit indignata*.

3. It is said that the papers were not immediately taken possession of, nor proceedings instituted, till long after the arrival in port. These are unquestionably irregularities ; but I agree with the King's Advocate in maintaining, that they are not such irregularities as will destroy the captor's right of proceeding, for the claimant had his remedy in the way of a monition. How these delays were occasioned, whether in consequence of pending negotiations, (as has been repeatedly asserted in the course of the argument), I am not judicially informed. If such negotiations ever existed, I may have reason personally to lament that they have proved ineffectual. But the legal consequence of that inefficacy undoubtedly is, that the question of law remains the same as if no such negotiation had ever been thought of.

4. It is lastly said, that they have proceeded only against the merchant vessels, and not against the frigate, the principal wrong-doer. On what grounds this was done, whether on that sort of comity and respect which is not unusually shewn

to the immediate property of great and august Sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a re-delivery of her papers, the act of the captors may perhaps furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, is confined to herself, and can be extended no farther.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting (for any thing that I know) that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negotiations have pledged (as has been intimated) the honour and good

faith of the country, I can only say that it has been much the habit, and I hope will for ever continue the habit, of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a Court of the Law of Nations, a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish the right of maritime capture in war; and to do this, how? By the direct use of hostile force on the part of a neutral state. It is high time that the legal merit of such a pretension should be disposed of one way or other; it has been for some few years past preparing in Europe; it is extremely fit that it should be brought to the test of a judicial decision: for a worse state of things cannot exist, than that of an undetermined conflict between the ancient law of nations, as understood and practised for centuries by civilized nations, and a modern project of innovation utterly inconsistent with it; and in my apprehension, not more inconsistent with it, than with the amity of neighbouring states, and the personal safety of their respective subjects.

The only remaining question which I have to consider is, the matter of expences; and this I think myself bound to dispose of with as much tenderness as I can use in favour of individuals.

It is to be observed, that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such persons. The authority of their country has been in some degree surprized in this matter; the captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think the claimants are clearly entitled to have their expences charged upon the value of the property up to the time of the order for further proof. From that time the property might have been withdrawn upon bail, and it is no answer to the Court to say that this gentleman or another gentleman did not think it adviseable to commit their private fortunes in the extent of the security required. It is the business of foreign owners who have brought their ships and cargoes into such situations of difficulty, to find the means of relieving them when the opportunity can be used. I go sufficient lengths in allowing expences for the further time in which orders could have been obtained from Sweden, and I fix this at the distance of two months from the order for further proof; and, condemning the ship and cargo, I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially on this case, after weighing,

with the most anxious care, the several facts and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself. I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

This is the substance of what I have to pronounce judicially on this case, after weighing,

A
LIST
OF
TREATIES

*Concluded since July, 1780, in which the
Principle is adopted of*

FREE SHIP, FREE GOODS.

1. **T****REATY** between Denmark and Russia, dated Copenhagen, 9th July, 1780, contained in Marten's *Recueil des Traités*, t. ii. p. 103, 109.
2. Treaty between Russia and Sweden, dated Petersburg, 21st July—1st August, 1780, *ibid.* p. 110, and the Separate Articles, vol. iv. p. 364.
3. Act of Accession of the United Netherlands, to the Treaty between Russia, Denmark, and Sweden, dated Petersburg, 24th Dec. 1780, 3d Jan. 1781, in Marten's *Coll.* t. ii. p. 117, 121: and the Separate Act, *ib.* vol. iv. p. 378.

4. Treaty between Russia and Prussia, 8th May, 1781, in Marten's Coll. t. ii. p. 130.

5. Austria's Accession to the Armed Neutrality, dated Vienna, 9th October, 1781, and accepted by Russia, 10th October, same year; *vide* Lampredi del Commercio dei Popoli Neutrali, vol. ii. p. 101 to 106.

6. Treaty between Russia and Portugal, dated Petersburg, 13th July, 1782, in Marten's, t. ii. p. 208 to 211.

7. Commercial Treaty between Spain and the Porte, dated Constantinople, 14th September, 1782, Art. xiii. ib. p. 229.

8. Treaty of Amity and Commerce between the United Netherlands and the North American States, dated 8th October, 1782, Art. 10, 19, and 24, 26, ib. p. 252, 263, 267, 271.

9. Treaty of Commerce between Denmark and Russia, 8th and 19th October, 1782, Art. 16, 22. ib. p. 290, 294.

10. Treaty of Commerce between Sweden and the North American States, dated Paris,

3d April, 1783, Art. 8, 16. ib. p. 332, 338.

11. Treaty of Commerce between Russia and the Ottoman Porte, dated Constantinople, 10th June, 1783, Art. 39, 40, 43, 60. ib. p. 392, 393, 397.

12. Treaty of Amity between the Emperor of the Romans and the Emperor of Morocco, 16th October, 1783, Art. 5. ib. p. 504.

13. Treaty between Spain and Tripoli, dated 10th September, 1784, ib. p. 531, 539.

14. Treaty of Commerce between Prussia and the North American States, 10th September, 1785, Art. 12, 15. ib. p. 571, 573.

15. Treaty of Alliance between France and the United Netherlands, dated Fontainebleau, 10th November, 1785, Art. 8. p. 616.

16. Commercial Treaty between Austria and Russia, 1st and 12th Nov. 1785, Art. 12,

18. in the Russian publication, *vide* Marten's, t. 2. p. 624, 627. and Art. 14, 20. in the Austrian, Marten's, ib. p. 636, 640.

17. Treaty of Peace between Spain and Algiers,
14th June, 1786, ib. p. 665, 672.
18. Treaty of Commerce between France and
Great Britain, 26th Sept. 1786. Art. 20, 42.
ib. p. 693, 704.
19. Treaty of Commerce between France and
Russia, dated St. Petersburg, 31st Dec.
1786, 11 Jan. 1787. Art. 26, 34. Marten's,
t. iii. p. 15, 19.
20. Treaty of Commerce between Russia and
Naples, 6th and 17th Jan. 1787. Art. 17,
24. ibid. p. 43, 48.
21. Treaty of Commerce between the North
American States and Morocco, 1st and
25th Jan. 1787. Art. 3, 6. ib. p. 56.
22. Treaty of Commerce between Russia and
Portugal, 9th and 20th Dec. 1787. Art.
22, 28. ibid. p. 117, 120.
23. Convention between France and Ham-
burg, dated Hamburg, 17th March, 1789.
Art. 2. ibid. p. 159.

24. Treaty of Commerce between Denmark and Genoa, dated Genoa, 30th July, 1789. Art. 4, 13. Marten's, t. iv. p. 536, 543.
25. Convention between Russia and Great Britain, dated London, 25th March, 1793, ib. t. v. p. 109, 113.

The following Pages are subjoined to a French Translation of Professor SCHLEGEL's Work, printed at Copenhagen, and contain the Substance of the Judgment in the Court of King's Bench, in the Case of Saleucci versus Johnson, Trin. 25 Geo. III. together with the Professor's Observations upon it, as contrasted with the Sentence of the Court of Admiralty upon the Swedish Convoy.

THE original Danish edition of this work had hardly issued from the press, when a friend pointed out to me, in "the System of the Law of Marine Insurances, by John Park,*" (a work considered as classic as well upon the Continent as in England,) a sentence pronounced in London, in the year 1785, by the Court which finally determines in all cases relative to maritime insurance. Upon this trial there presided, in the absence of my Lord Chief Justice Mansfield, the Judges Willes, Ashhurst, and Buller, men who are esteemed amongst the most enlightened Judges of whom England boasts; and this sentence is marked in the work as one of those decisions which fix the law, and serve as precedents to the tribunals. As it rests upon principles dia-

* Edit. 1796. p 78, 80. and 363, 365.

metrically opposite to those of the Judge of the Admiralty, I shall give a brief idea of the cause which gave occasion to, and the motives which dictated this sentence.

During the American war, a neutral vessel belonging to Tuscany, of which the cargo was also neutral, but destined to London, and the property insured in that city, was seized on the coast of Barbary by a Spanish cruizer; and carried into a port of Spain. The first tribunal pronounced the confiscation of this ship and cargo, on the two following grounds: 1st. That as the vessel had resisted search, and even resisted by actual force, having fired upon the Spanish cruizer, it was, from that circumstance alone, agreeably to the law of Spain, liable to confiscation. 2dly. Because there was not any *charter party* on board, but simply a *manifest*, specifying the merchandizes of which the cargo consisted. A second tribunal annulled this sentence, which was nevertheless confirmed by the superior Court: where, however, the defect of the *charter party* was not dwelt upon, this deficiency being with reason regarded as amply supplied by the *manifest*. There was, consequently, no doubt as to the ship and cargo being really *neutral property*, and the sole motive for condemnation was the active and violent resistance opposed to the visit

of the cruizer, for the law of Spain, in all such cases, pronounces *confiscation* of the property. The owners of the vessel so condemned having had recourse to the London insurers, the latter refused the payment of the insurance, on the same grounds, pretending, as does Sir William Scott, in his sentence, that the visitation of neutral vessels, in open sea, is the incontestible right of the cruisers of belligerent nations; that neutral vessels are obliged to submit to such search, without which they may lawfully be considered as enemies; and that the Tuscan captain having, by his resistance and firing upon the Spanish vessel, been guilty of a breach of neutrality, and from that circumstance alone, having caused the condemnation, the insurers were not responsible for a loss which his own fault had evidently brought upon himself.

Notwithstanding every thing that is said relative to the facility with which the English underwriters succeed in eluding the demands of proprietors or fitters-out of vessels, and although the motives alledged were of a description to be favourably received in the tribunals of a belligerent nation, with whom the dominion of the sea has always appeared of the highest importance to its marine, yet the three before-mentioned Judges, after having heard the parties, were

unanimously of opinion, that the master of the vessel insured, by resisting the search of the Spanish cruizer, had not committed an illegal act, nor forfeited the neutrality of his ship: and they, in consequence, condemned the underwriters to pay the sum specified in the policy. Two of the Judges laid it down upon this occasion, as a principle, “ that visitation at sea is an *act of force* which the cruizer exercises at his own risk and peril, and which of course they resist whenever they can. If the ship or cargo be the property of an enemy; or if the cargo be contraband, then the seizor is justified, and the objects seized are declared to be good prize; but if the case be otherwise, then he is condemned to indemnify the owners, and pay all costs.— Judge Buller, in supporting this principle, which he fully adopted, added the following observation, which is equally true and remarkable: “ the seizure which is made in consequence of the private ordonnances of a foreign state, is a risk which falls to the insurer, for these ordonnances form no part of the law of nations, nor is the captain culpable for having violated them; a ship is bound to pay respect to the laws of the country from which she sails, and to those of that to which she is destined; but not to the private ordonnances of other Powers.”

Such then are, in what concerns the visitation at sea of neutral vessels, and the right of avoiding it when one can, the principles laid down by the most eminent Judges in England, in a cause where left entirely to their own understandings and accustomed rectitude, they could not be influenced by the consideration of a fluctuating convenience, or interested policy. Let us apply this to the case of the Swedish convoy, and with this view suppose that the vessels of which it was composed had been insured in London, and that the sentence of Sir William Scott, having been confirmed by the Court of Appeals, there remained no other remedy to the proprietors, than that of proceeding against the underwriters. If these latter sought to evade their engagements, they could only place their reliance on the sentence and arguments of the Judge of the Admiralty; for however consummate the English lawyers may be in the art of establishing their case, where could they find means of which this Judge, equally able and profound, has not availed himself?

On the other side, should the same tribunal which decided against the insurers of the Tuscan vessel have to determine in the Swedish cause, and, as one cannot doubt, should be desirous of acting consistently, what would it not have, to

reply to the arguments of the insurers of the convoy? " You pretend, *this tribunal would say*, that the right of visiting neutral merchant ships, upon the open sea, is an incontestible right of the cruisers of belligerent Powers, but you do not prove it; for no law, no obligatory act, imposes upon neutral ships the duty of submitting, in this point, to the pretensions of cruisers. You acknowledge, that visitation by the latter is an *act of force*, but you add, that it is an act of *legal force*; something similar to a search ordered, by a competent judge, in a judicial cause, and which the party interested cannot oppose, without incurring the penalties decreed against such as are convicted. We say that your distinction is not more just than your comparison; that the visitation at sea, exercised upon neutral vessels, is, in the utmost extent of the term, an *act of force*, an act to which, consequently, no *legal obligation* can apply; this act is exercised by cruisers at their risk and peril, and it is clearly permitted to those who are the object of the search, to avoid it whenever they can."

" In vain do you cite the law of Spain, or that of England, to prove, that vessels resisting search incur the penalty of confiscation, these are private ordinances, which do not form a part

of the law of nations, and which neutral vessels are not bound to obey. The only laws of this kind, which a neutral vessel is obliged to respect, are those of the country from whence it comes, or to which it is going."

"That which we assert, *would they add* and have decreed, to be true, with respect to a neutral vessel not under *convoy*, is much more so, when applied to a fleet of neutral vessels *escorted by a frigate acting under the orders of its Sovereign*. If the former was not bound to respect the private ordinances of the belligerent Powers, how much less would the fleet in question be so?"

"If the resistance exercised, the *resistance by actual force* of the former vessel, is an act with which the master cannot be reproached as an illegal act, in a much less degree can the *simple menace of resisting*, destitute of all execution, on the part of the Swedish commander, be considered as a fault, by which he has either legally or voluntarily incurred confiscation."

"The visitation being, as we have already said, an act of force carried into execution at the risk and peril of the captor, it results, that if the vessel so seized, be found to be neutral as well as its cargo, and if it do not contain any contra-

band articles, the seizure is null, and the seizer bound to indemnify the proprietor, and pay all costs. As no doubt therefore has arisen, either as to the neutrality of the vessels convoyed by the Swedish frigate, or their cargoes, it is clear that the loss of these vessels is not the act of those who commanded them, but of the Judges who pronounced upon the seizure; and as this seizure is made by virtue of a private ordinance of one of the belligerent States, it is a risk which the insurer must run, like every other risk of the sea, to which the insured has not given rise from any fault on his part."

"You say that the Swedish cargoes were contraband, and this is also asserted by the Judge, but neither he, nor you, nor the captors, have proved it. They have cited commentators who affirm it, to which formal treaties have been opposed, which declare the contrary. They have talked of private ordinances of certain States, but such ordinances do not compose any part of the law of nations; to this, treaties, and treaties only, serve as a basis. They have cited a treaty between England and Denmark, which declares *hemp, pitch, and tar*, to be contraband; this treaty, however, is solely applicable to these two Powers respectively. It is not a law for Sweden, which was not a party to it, nor owes any sub-

jection either to England or Denmark; upon this point, the treaties between England and Sweden are perfectly clear. They enumerate in a most minute detail, every thing which ought to be considered as contraband; but as the merchandizes found on board the Swedish vessels are not comprized in this enumeration, they are consequently not contraband. These treaties declare to be free and lawful all merchandizes which are not expressly prohibited, and as hemp, pitch, and tar, are not expressly prohibited, these articles are consequently legal and permitted; and as the condemnation, pronounced by the Judge, does not impute to the insured any fault, they are thereby evidently left in full possession of all their rights against the insurer."

Such, in a few words, is what results from the judgment reported by Mr. Park; these are the weapons he furnishes against the sentence of the Judge of the Admiralty. It is for the impartial and enlightened reader to decide, whether I may not say with reason, "that this sentence is so manifestly contrary to the principles of Sir William Scott, that it alone furnishes a most complete refutation of them."

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FINIS.